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EMPLOYMENT EQUITY ACT 55 OF 1998

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AMENDMENTS TO THE CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES IN THE WORKPLACE

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(Take note that the original Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace was published in terms of the Labour Relations Act 66 of 1995 under Government Notice 1367 in Government Gazette 19049 dated 17 July 1998)

Notice is hereby given that the Amendments to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace set out in the schedule is issued by the Minister of Labour, on the advice of the Commission for Employment Equity, in terms of section 54(1)(b) of the Employment Equity Act, 1998 (Act No 55 of 1998).

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MINISTER OF LABOUR
22/06/05**

AMENDED CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES IN THE WORKPLACE

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1. Introduction

- 1.1 The objective of this code is to eliminate sexual harassment in the workplace.
- 1.2 This code provides appropriate procedures to deal with sexual harassment and prevent its recurrence.
- 1.3 This code encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace.

2. Application of the code

- 2.1 Although this code applies to the working environment (1) as a guide to employers, employees and applicants for employment, the perpetrators and victims of sexual harassment may include:

- 2.1.1 owners
- 2.1.2 employers
- 2.1.3 managers
- 2.1.4 supervisors
- 2.1.5 employees
- 2.1.6 job applicants
- 2.1.7 clients
- 2.1.8 suppliers
- 2.1.9 contractors
- 2.1.10 others having dealings with a business

- 2.2 Nothing in 2.1 above confers the authority or obligation on employers to take disciplinary action in respect of non-employees.
- 2.3 A non-employee who is a victim of sexual harassment may lodge a grievance with the employer of the harasser, where the harassment has taken place in the workplace or in the course of the harasser's employment. (2)
- 2.4 Where the term "employee" is used in this code, it will be deemed to include applicants for employment.

3. Sexual Harassment as a form of unfair discrimination

Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation. (3)

4. Test for Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- 4.2 whether the sexual conduct was unwelcome;
- 4.3 the nature and extent of the sexual conduct; and
- 4.4 the impact of the sexual conduct on the employee.

5. Factors to establish sexual harassment

5.1 Harassment on a prohibited ground

5.1.1 The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation.

5.1.2 Same-sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

5.2 Unwelcome conduct

5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.

5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.

5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.

5.3 Nature and extent of the conduct

5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.

5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

5.3.2 Sexual harassment may include, but is not limited to, victimization, *quid pro quo* harassment and sexual favouritism.

5.3.2.1 Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.

5.2.3.2 *Quid pro quo* harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.

5.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.

5.4 Impact of the conduct

The conduct should constitute an impairment of the employee's dignity, taking into account:

5.4.1 the circumstances of the employee; and

5.4.2 the respective positions of the employee and the perpetrator in the workplace.

6. Guiding principles

Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which complainants of

sexual harassment will not feel that their grievances are ignored or trivialized, or fear reprisals. Implementing the following guidelines can assist in achieving these ends:

- 6.1 Employers/management and employees are required to refrain from committing acts of sexual harassment.
- 6.2 All employers/management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others.
- 6.3 Employers/management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business are not subjected to sexual harassment by the employer or its employees.
- 6.4 Employers/management should take appropriate action in accordance with this code where instances of sexual harassment occur in the working environment.

7. Sexual Harassment Policies

- 7.1 Employers should, subject to any existing collective agreements and applicable statutory provisions in respect of sexual harassment, adopt a sexual harassment policy, which should take cognisance of and be guided by the provisions of this code.
- 7.2 The contents of sexual harassment policies should be communicated effectively to all employees.
- 7.3 The adoption of a sexual harassment policy and the communication of the contents of the policy to employees, should, amongst other factors, be taken into consideration in determining whether the employer has discharged its obligations in accordance with the provisions of section 60(2) of the Employment Equity Act (EEA).
- 7.4 Sexual harassment policies should substantially comply with the provisions of this code and include at least the following statements:
 - 7.4.1 Sexual harassment is a form of unfair discrimination on the basis of sex and/or gender and/or sexual orientation which infringes the rights of the complainant and constitutes a barrier to equity in the workplace.
 - 7.4.2 Sexual harassment in the workplace will not be permitted or condoned.
 - 7.4.3 Complainants in sexual harassment matters have the right to follow the procedures in the policy and appropriate action must be taken by the employer.

7.4.4 It will be a disciplinary offence to victimize or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

7.5 The procedures to be followed by a complainant of sexual harassment and by an employer when sexual harassment has occurred, should be outlined in the policy.

8. Procedures

Employers should develop clear procedures to deal with sexual harassment. These procedures should enable the resolution of problems in a sensitive, efficient and effective way.

8.1 Reporting sexual harassment

8.1.1 Section 60(1) of the EEA provides that conduct in contravention of the EEA must *immediately* be brought to the attention of the employer.

8.1.2 In instances of sexual harassment, the word "*immediately*" shall mean, as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace.

8.1.2 Sexual harassment may be brought to the attention of the employer by the complainant or any other person aware of the sexual harassment, for example a friend, colleague or human resources official acting on the request of the complainant, where the complainant has indicated that she/he wishes the employer to be made aware of the conduct. However, where the sexual harassment is of a particularly serious nature, the complainant should be encouraged to inform the employer.

(Publisher's note – Duplication of the numbering of paragraphs 8.1.2 as published in the original Government Gazette)

8.2 Obligations of the employer

When sexual harassment has been brought to the attention of the employer, the employer should:

8.2.1 consult all relevant parties;

8.2.2 take the necessary steps to address the complaint in accordance with this code and the employer's policy; and

8.2.3 take the necessary steps to eliminate the sexual harassment.

8.3 The steps to be taken by the employer on receipt of a complaint by a complainant, should include but not be limited to the following:

8.3.1 advising the complainant of the informal and formal procedures available to deal with the sexual harassment, as set out in items 8.5, 8.6 and 8.7 of this code;

8.3.2 where reasonably practicable, offering the complainant advice, assistance and counselling as set out in item 8.4 of this code, including during any disciplinary enquiry that may be instituted; and

8.3.3 following the procedures required by items 8.5, 8.6 and 8.7 of this code, in a manner that is procedurally and substantively fair.

8.4 Advice and assistance

8.4.1 A complainant of sexual harassment may require advice and assistance, including counselling.

8.4.2 As far as is practicable, employers should designate a person outside of line management who complainants may approach for confidential advice and/or counselling. Such person:

8.4.2.1 could be a person employed by the employer to perform such a function, a trade union representative, a co-employee or a professional engaged to perform such activity;

8.4.2.2 should have the appropriate skills and experience, including counselling and labour relations skills; and

8.4.2.3 should be properly trained and given adequate resources.

8.5 Advising the complainant of workplace procedures to deal with sexual harassment

8.5.1 When an incident of sexual harassment is brought to the attention of an employer, such employer should:

8.5.1.1 advise the complainant that there are formal and informal procedures which could be followed to deal with the problem;

8.5.1.2 explain the formal and informal procedures to the complainant;

- 8.5.1.3 advise the complainant that she/he may choose which procedure should be followed by the employer, except that in certain limited circumstances, as set out in clause 8.7.2, the employer may choose to follow a formal procedure even if the complainant does not wish to do so;
- 8.5.1.4 re-assure the complainant that she/he will not face job loss or any adverse consequences if she/he chooses to follow either the formal or informal procedure;
- 8.5.1.5 advise the complainant that the matter will be dealt with confidentially if the complainant so chooses.

8.6 Informal procedures

8.6.1 A complainant of sexual harassment may choose to follow either of the following informal procedures:

- 8.6.1.1 the complainant or another appropriate person explains to the perpetrator that the conduct in question is not welcome, that it offends the complainant, makes him or her feel uncomfortable and that it interferes with his or her work; or
- 8.6.1.2 an appropriate person approaches the perpetrator, without revealing the identity of the complainant, and explains to the perpetrator that certain forms of conduct constitute sexual harassment, are offensive and unwelcome, make employees feel uncomfortable, and interfere with their work.

8.6.2 An employer should consider any further steps, which can be taken to assist in dealing with the complaint.

8.7 Formal procedure

8.7.1 A complainant may choose to follow a formal procedure, either with or without first following an informal procedure.

8.7.2 In the event that a complainant chooses not to follow a formal procedure, the employer should still assess the risk to other persons in the workplace where formal steps have not been taken against the perpetrator. In assessing such risk the employer must take into account all relevant factors, including the severity of the sexual harassment and whether the perpetrator has a history of sexual harassment. If it appears to the employer after a proper investigation that there is a significant risk of harm to other persons in the

workplace, the employer may follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant accordingly.

8.7.3 The employer's sexual harassment policy and/or collective agreement should outline the following in respect of a formal procedure:

8.7.3.1 with whom the employee should lodge a grievance;

8.7.3.2 the internal grievance procedures to be followed, including provision for the complainant's desired outcome of the procedures;

8.7.3.3 time frames which will allow the grievance to be dealt with expeditiously;

8.7.3.4 that should the matter not be satisfactorily resolved by the internal procedures outlined above, a complainant of sexual harassment may refer the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Similarly an alleged perpetrator of sexual harassment may refer a dispute arising from disciplinary action taken by the employer to the CCMA; and

8.7.3.5 that it will be a disciplinary offence to victimize or retaliate against a complainant who in good faith lodges a grievance of sexual harassment.

8.8 Disciplinary sanctions

The employer's sexual harassment policy should specify the range of disciplinary sanctions that may be imposed on a perpetrator. The sanctions must be proportionate to the seriousness of the sexual harassment in question, and should provide that:

8.8.1 warnings may be issued for minor instances of sexual harassment;

8.8.2 dismissal may ensue for continued minor instances of sexual harassment after warnings, as well as for serious instances of sexual harassment;

8.8.3 in appropriate circumstances upon being found guilty of sexual harassment, a perpetrator may be transferred to another position in the workplace.

9. Confidentiality

9.1 Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.

- 9.2 In cases of sexual harassment, management, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary inquiry. Only appropriate members of management as well as the aggrieved person, representatives, alleged perpetrator, witnesses and interpreter if required should be present in the disciplinary inquiry.
- 9.3 Employers are required to disclose to the complainant, the perpetrator and/or their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this code.

10. Additional sick leave

- 10.1 Where an employee's existing sick leave entitlement has been exhausted, the employer should give due consideration to the granting of additional paid sick leave in cases of serious sexual harassment, where the employee, on medical advice, requires trauma counselling.
- 10.2 In appropriate circumstances, employers may give consideration to assisting with the cost of the medical advice and trauma counselling, where such amounts are not covered by any applicable medical aid scheme.

11. Information and education

- 11.1 Where feasible, the Department of Labour should endeavour to ensure that copies of this code are accessible and available in the official languages.
- 11.2 Employers and, where applicable, employer organizations should include the issue of sexual harassment in their orientation, education and training programs.
- 11.3 Trade unions should include the issue of sexual harassment in their education and training programs for shop stewards and employees.
- 11.4 CCMA commissioners should receive specialized training to deal with sexual harassment cases.

FOOTNOTES

- (1) & (2) Where sexual harassment occurs outside of the working environment, regard should be had to the Promotion of Equality and Prevention of Unfair Discrimination Act. 4 of 2000.
- (3) Section 6 of the Employment Equity Act 55 of 1998 provides that no person may unfairly discriminate, directly or indirectly against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion. HIV status, conscience, belief, political opinion, culture, language and birth.