



CANADIAN HUMAN RIGHTS COMMISSION



FRAMEWORK FOR COMPLIANCE AUDITS UNDER THE *EMPLOYMENT EQUITY ACT*

Audit Process and Statutory Requirements

May 2007

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Canada

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Purpose of the *Employment Equity Act*

The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

Section 2 of the Act

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INTRODUCTORY REMARKS

Purpose of document

This framework document summarizes the essential elements of the Canadian Human Rights Commission's Employment Equity Compliance Program as reflected in the *Employment Equity Act*. The document is aimed at employers, trade association representatives, unions, as well as groups and individuals who have an interest in the Commission's activities.

This document outlines the Commission's approach to the planning of audit cycles, the selection of employers, the audit process, and the steps related to the possible enforcement measures.

Historical perspective

When Parliament introduced the first *Employment Equity Act* in 1986, the intent was to achieve equality in the workplace and to increase the representation of members of designated groups. To do so, employers covered by the legislation were expected to identify and eliminate unnecessary barriers limiting the employment opportunities of disadvantaged groups: visible minorities, women, Aboriginal peoples and persons with disabilities. In 1996, the Act was amended and the Canadian Human Rights Commission was given the mandate to conduct audits in order to ensure compliance with the Act. It also allowed for the establishment of Employment Equity Review Tribunals to hear employment equity cases.

The audit experience

Between 1997 and 2006, the Commission conducted nearly 300 audits with federally regulated private-sector employers, government departments, and agencies. From the onset, the audit process was based on the premise of negotiation and persuasion dictated by the Act's guiding principles. In most cases, undertakings were agreed upon with employers to address areas of non-compliance and enforcement measures were only taken as a last resort as prescribed by the Act.

During this period, the audit program covered the vast majority of federal departments and agencies and a multitude of private-sector organizations (notably in the banking, communication and transportation sectors). Most employers audited were eventually found in compliance with the Act.

A new approach

The audit framework was initially designed after extensive consultations with industry representatives and organizations representing designated groups, labour unions and interested individuals. Since the audit program began in 1997, the Commission has conducted a considerable number of audits which provided valuable information. This framework document has therefore been revised to reflect the insights, knowledge gained, and lessons learned from these audits.

The Commission has reviewed its audit process in order to streamline the assessment of employers' compliance status. The aim of the new process is to render compliance assessment more efficient, less time consuming and ultimately to ensure the increase of the representation of designated group members. Here are a few changes that are being introduced:

- The Framework for Compliance Audits under the *Employment Equity Act* document has been revised to better reflect the terminology of the requirements found in the Act. The main requirements to be audited under the *Employment Equity Act* are as follows:
 1. Collection of workforce information;
 2. Workforce analysis;
 3. Review of employment systems, policies and practices;
 4. Employment Equity Plan;
 5. Implementation and monitoring of Employment Equity Plan;
 6. Periodic review and revision of Employment Equity Plan;
 7. Information about employment equity;
 8. Consultation; and
 9. Employment equity records.
- Indicators were developed to ensure a more consistent approach to the assessment of compliance while providing employers with clearer expectations based on the Act's requirements. In all cases, the audit process leads to the issuance of an audit report describing the employer's compliance status.
- In cases of non-compliance, the Commission will negotiate undertakings with employers to ensure that all legislative obligations will be fulfilled. In order to render the new process more efficient and less time consuming, both the Commission and employers will be required to address employment equity issues in an appropriate, but more timely manner.
- The process focuses upon the employer demonstrating that it is in compliance with the statutory requirements. Employers are now encouraged to utilize the resources available to them through Human Resources and Social Development Canada (HRSDC) or the Public Service Human Resources Management Agency of Canada (PSHRMAC), as appropriate, should they require clarifications on the statutory requirements or assistance in the development of their employment equity program.

- Through the Discrimination Prevention Program, the Commission will act to encourage organizations to establish workplaces that foster respect of human dignity and human differences. The Discrimination Prevention Program includes the Employment Equity Compliance Division which is responsible for the conduct of employment equity audits.
- The Discrimination Prevention Program also includes the Prevention Initiatives and Liaison Division. As part of its recent initiatives, the Commission has begun establishing memoranda of understanding (MOUs) with employers under federal jurisdiction. These MOUs will focus on large employers that are willing to work with the Commission to prevent discrimination thereby contributing to the promotion of employment equity. As part of these MOUs, the Commission will consult with the management teams of these organizations to select the main areas of concern and develop strategies to deal with them. Commission staff will work closely with stakeholders on solutions to human rights issues. These solutions could include creating new policies or changing existing ones; sharing best practices through human rights training and information; and developing instruments to assist employers, such as case studies, presentations, posters and interactive teaching tools.

Employer's obligations

Under the Act, federally regulated employers are to analyze their workforce and review their employment systems in order to develop a meaningful Employment Equity Plan. Employers must also report annually to HRSDC or PSHRMAC, as appropriate, on the representation in their workforce of persons from the four designated groups: women, visible minorities, persons with disabilities and Aboriginal peoples.

In addition, when under-representation exists for designated groups, employers are required to implement an Employment Equity Plan which will lead to progress in achieving equality. It is the employers' obligation to monitor the implementation of the plan and the resulting employment equity progress achieved. They must also review and revise the plan accordingly. These activities are to be conducted in consultation with the employee representatives.

Guiding principles & overall approach

The Act recognizes the importance of collaborative efforts in bringing about equality in the workplace. The legislation encourages consultation and cooperation between all parties: employers, employees, unions, designated group organizations and government, in achieving the principles of employment equity. In conducting audits, the Canadian Human Rights Commission counts on employers' cooperation and their continued efforts to achieve the goals of the *Employment Equity Act*. The audit process is based on this premise of negotiation and persuasion dictated by the Act as a guiding principle, and the Commission's own long standing practice that, wherever possible, undertakings be agreed upon to redress areas of non-compliance. Should this process fail, the Commission may issue a Direction and either party may appeal to an Employment Equity Review Tribunal to resolve contentious issues.

The audit process is grounded on two equally important considerations. First, it permits the Compliance Review Officer to gather the information necessary to reach an informed and reasoned assessment of the employer's compliance with the statutory requirements. Second, it seeks to minimize the impact on an employer's workload and disruptions to its operations. The process is designed to permit flexibility and responsiveness to the size and structure of an organization. Compliance Review Officers will work with employers to make necessary adjustments to reflect the individual circumstances and business environment of an organization.

PROCESS FOR COMPLIANCE AUDITS

1. FRAMEWORK

Requirements of the *Employment Equity Act*

The *Employment Equity Act* requires employers to develop and implement an employment equity program, in consultation and collaboration with employee representatives, to remove barriers for the four designated groups in order to achieve a representative workforce. The Act specifies employers' responsibilities and gives the Commission the authority to ensure compliance through the conduct of audits.

The workforce

Close to a million workers are covered by the Act. Although the number of employers vary, the Act currently applies to some 500 federally regulated private-sector organizations and Crown corporations with just over 650,000 employees, and 94 federal departments and agencies with approximately 312,000 employees¹. The Treasury Board is the employer for 73 of these federal bodies, representing some 166,000 employees.²

The Commission recognizes the roles of the Public Service Human Resources Management Agency of Canada (PSHRMAC) and the Public Service Commission (PSC) in the management and administration of employment equity programs in government departments and agencies. In conducting audits of the federal public sector, Compliance Review Officers will be mindful of the impact of central agency guidelines and directives on the management of employment equity programs in individual departments. PSHRMAC will be advised of the audit notification of a federal department or agency.

The Commission also acknowledges the importance of the role played by Human Resources and Social Development Canada (HRSDC) with regard to private sector employers and their employment equity programs. Accordingly, HRSDC will be advised of the notification of audits of private sector employers.

1. As of December 31, 2005 for the private sector.
2. As of March 31, 2005 for the public sector.

Overview of the audit process

Preliminary assessment phase

The audit process begins with the Commission sending a letter to the employer to provide notification of the audit. Soon thereafter, a Compliance Review Officer from the Commission sends an Employment Equity Audit Questionnaire and other documents to the employer. After the employer has completed the questionnaire and returned it along with other requested documentation, the Compliance Review Officer assesses the documents.

If the Compliance Review Officer determines that the employer is in compliance with the *Employment Equity Act*, a recommendation is made to the Commission to that effect. The Commission's decision is communicated to the employer by letter and information about the employer's continuing obligations under the Act is included. The preliminary assessment phase of the audit is then considered to be complete.

If, on assessing the employer's documents, the Compliance Review Officer determines that the employer is not in compliance with the Act, the Compliance Review Officer negotiates undertakings with the employer to assist in correcting the deficiencies observed. Within four months, the employer is expected to fulfill its undertakings and the Compliance Review Officer assesses the progress the employer has made in implementing the undertakings. If the employer is now in compliance with the Act, the preliminary assessment phase of the audit is concluded as described above.

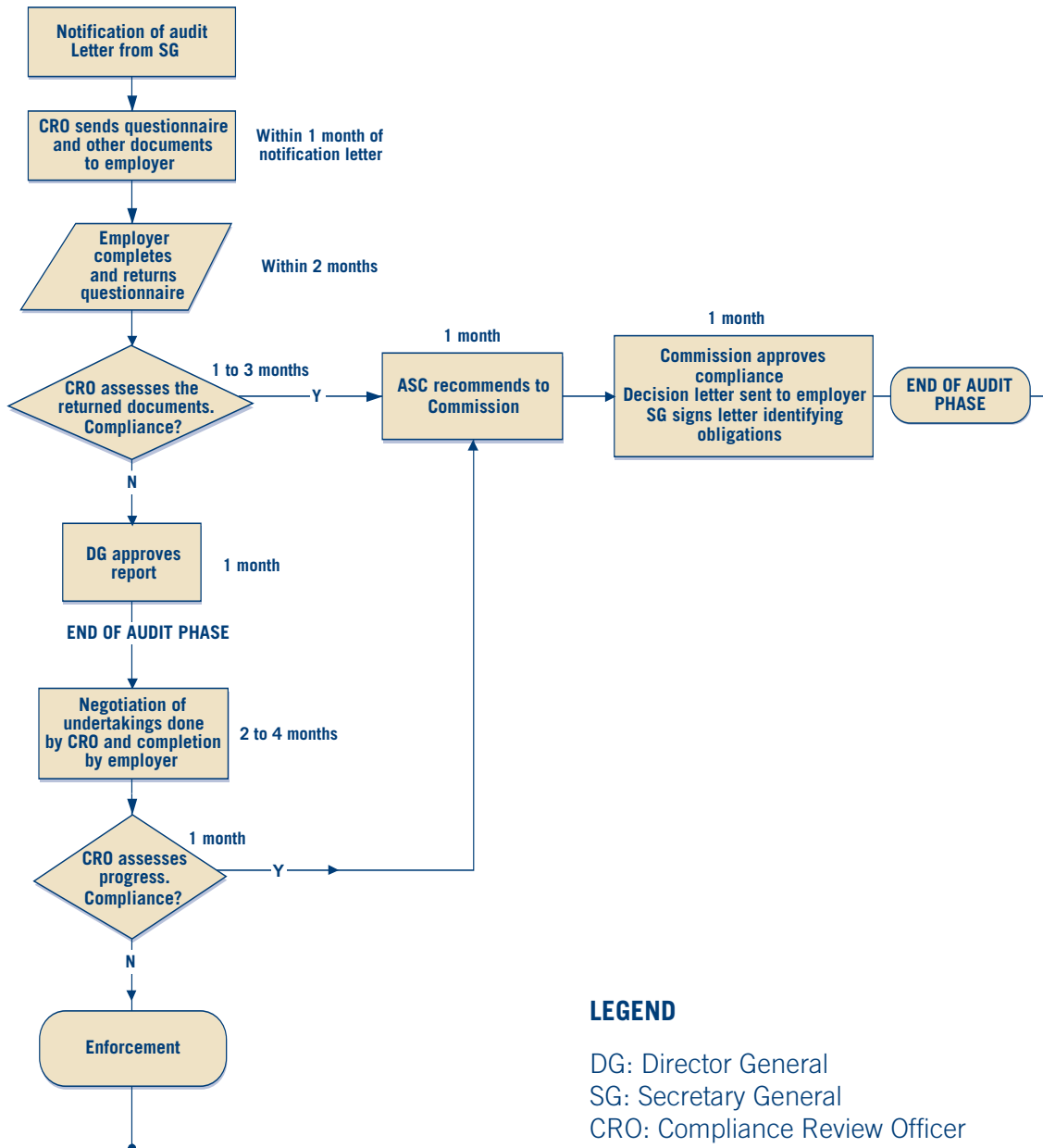
If the employer is still not in compliance, however, the Commission may issue a Direction to which the employer must respond by a set deadline. The Compliance Review Officer reassesses the employer's progress at the end of the defined period. If the employer is still not in compliance, the Commission may refer the employer to an Employment Equity Review Tribunal.

Progress assessment phase

The progress assessment phase of the audit normally begins three to five years after the preliminary assessment. This phase is designed to ensure that the employer continues to meet the audit requirements assessed in the preliminary phase. Particular attention is paid to the employer's progress in implementing the Employment Equity Plan, leading to improved representation levels.

Note: Assessments are made in part based on documentation provided by the employer. An on-site visit by a Compliance Review Officer will often follow. The Commission representative may conduct interviews with employees, employee representatives and managers to help validate findings.

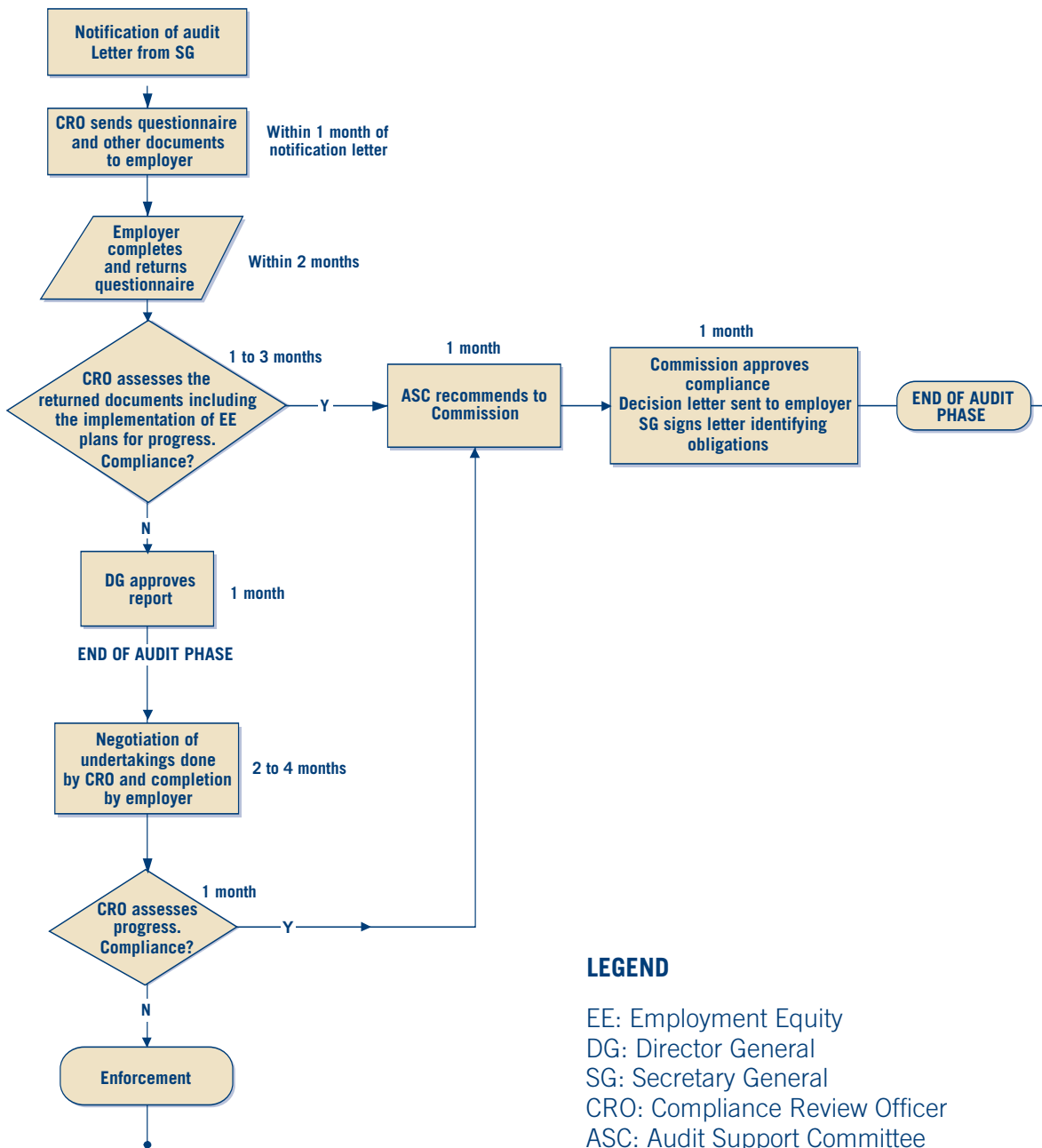
AUDIT STEPS PRELIMINARY ASSESSMENT PHASE



LEGEND

DG: Director General
 SG: Secretary General
 CRO: Compliance Review Officer
 ASC: Audit Support Committee

AUDIT STEPS PROGRESS ASSESSMENT PHASE



LEGEND

EE: Employment Equity
 DG: Director General
 SG: Secretary General
 CRO: Compliance Review Officer
 ASC: Audit Support Committee

Confidentiality

Section 34 of the *Employment Equity Act* requires information gathered as a result of compliance audits to be treated as confidential. Having said that, the Commission is also subject to the disclosure requirements of the *Access to Information Act* which take precedence over the stipulations of the *Employment Equity Act*.

The Commission is mindful of the importance of preserving the confidentiality of documents in an employment equity audit. This issue is especially important when dealing with private-sector employers, as it may provide the foundation on which to build a climate of cooperation and confidence between the employer and the Compliance Review Officer.

The Commission must thus try to establish a balance between the need to observe the spirit of confidentiality enshrined in the *Employment Equity Act*, and the principles of disclosure found in the *Access to Information Act*.

As a basic premise, documents supplied to the Commission by the employer during the course of an audit will be returned to the employer upon completion of the audit. The Commission will review the information and will keep on file only those documents which it considers essential to the progress assessment phase of the audits.

It should be noted that under the *Access to Information Act*, some third-party information can be protected from release. This would include information of a financial or commercial nature, information which could result in material financial loss or gain, prejudice the competitive position, or interfere with contractual or other negotiations of third parties. As well, under the *Privacy Act*, information of a personal nature can be protected from public release.

Consequently, upon receiving a request under the *Access to Information Act*, the Commission may be required to release any documents on file which do not contain personal information, trade secrets or other confidential business information. In every case, the Commission will advise the employer that a request under the Act has been received, and the organization will be given the opportunity to submit reasons why material should or should not be released. The Commission is hopeful that its practices as outlined herein will minimize any difficulties. The situation will be carefully monitored to ensure a fair and balanced approach.

Further, Section 34 of the *Employment Equity Act* also prohibits the use of information obtained by the Commission as a result of compliance audits in any proceedings under any other Act including the *Canadian Human Rights Act*, without the consent of the employer or individual from whom it has been obtained.

2. STRATEGIC PLANNING OF AUDITS

Audit cycle

Strategic planning of the audit cycle is an internal exercise during which the following occurs:

- long-term strategies are established to ensure that all organizations subject to the Act will be audited, and that follow-up work to measure the progress employers are making in achieving employment equity will be carried out within a reasonable time frame; and
- annual audit schedules are developed which confirm the number and identity of the organizations that will be subject to audits, including those employers previously audited whose progress will be monitored.

Selecting employers

Any employer under federal jurisdiction can be selected for an audit. The list of private-sector employers and Crown Corporations subject to audits is the same as the list of employers who submit annual reports to HRSDC. Audits in the public sector include all departments and agencies covered by the Act.

Statutory requirements and indicators

The audits will focus on the statutory requirements and indicators derived from the Act. These indicators should not be viewed as inflexible standards for compliance with the law. The Commission recognizes that there will be cases in which certain elements of employment equity planning will have to be considered judiciously in order to reflect special circumstances surrounding individual organizations. Where obstacles to implementing certain elements are found to exist, or where their implementation may result in undue hardship and the exercise of discretion is warranted, good faith efforts will be a key factor in assessing compliance.

Audit coordination

In scheduling audits for employment equity purposes, the Commission will take into account the audit cycles of other federal regulatory bodies in order to minimize instances where employers may have to undergo multiple audits during the same time frame.

3. THE AUDIT PROCESS IN DETAIL

As previously mentioned, the audit process includes a preliminary assessment phase and a subsequent progress assessment phase.

The preliminary assessment phase consists of evaluating the employer's compliance with the nine statutory requirements of the Act. This phase of the process normally leads to the issuance of an audit report. The Commission then monitors the performance of organizations through a review of their annual reports submitted to either HRSDC or PSHRMAC.

The progress assessment phase (three to five years later) consists of determining the progress made by the employer in continuing to meet the audit requirements assessed in the preliminary phase, with a focus on how effectively the employer has implemented its Employment Equity Plan to reduce under-representation. If the employer has reached its hiring, promotions and representation goals, this is usually considered as reasonable progress realized.

The following section presents a detailed description of the steps for both the preliminary assessment and progress assessment phases of the audit process.

Step 1 – Notification

Objective: Initiating contact with the employer

The Secretary General of the Commission will notify the employer that an audit of the organization will be started soon under the *Employment Equity Act*. Employers will be informed that a Compliance Review Officer will be in contact with officials responsible for employment equity planning within the organization in order to discuss various aspects of the audit and the scheduling of the various audit steps.

The Compliance Review Officer will gather basic information about the employer and industrial sector in order to develop a greater understanding of the environment in which the employer operates, the constraints it may be facing, and the opportunities it may have in implementing employment equity. In particular, the Compliance Review Officer will have access to private-sector and Crown Corporation reports filed annually with HRSDC, and to data from PSHRMAC covering the federal Public Service.

Within 30 days of an employer being notified, the Compliance Review Officer will contact the appropriate officials in the organization to develop an audit plan. Background documentation will be provided to the employer, including:

- a description of the process, requirements and indicators on which the audit will be based; and
- an Audit Questionnaire (available on the Commission's Website) designed to enable the gathering of basic information and documentation about the employer's employment equity activities as they relate to the requirements established by the Act.

The Compliance Review Officer will discuss a specific start date for the audit, suggest appropriate time lines based on the employer's particular circumstances, and clarify requirements and expectations. A letter will be sent to the employer confirming the dates for the entire audit process, as well as stipulating the time allowed for completion of the Audit Questionnaire and the general provision of information.

Step 2 – Audit Questionnaire

Objective: Initial evaluation of compliance status

The employer will be given up to 60 calendar days to complete and submit the Audit Questionnaire and supporting documentation. While this work is the responsibility of the employer, the Compliance Review Officer will be available to respond to any questions and help clarify this process for employers. An employer's responses to the Audit Questionnaire are particularly critical, as they will help form the basis on which the Compliance Review Officer will judge the organization's performance against each of the requirements of the Act.

Once the completed Audit Questionnaire and supporting documentation have been received, they will be reviewed for an initial assessment. If the material is incomplete or the information unclear, the Compliance Review Officer will contact the employer to follow up on these items. Based on the information provided, the Compliance Review Officer will compare the employer's actual employment equity activities with the legislated requirements and indicators included in the Audit Questionnaire.

The work done by the Compliance Review Officer will include a comparative analysis of the employer's workforce profile with external representation data; an assessment of the work completed on the review of the organization's employment systems; and an examination of the Employment Equity Plan, including an assessment of progress in the representation of designated groups over a specific period of time.

After the Compliance Review Officer has completed an initial evaluation, priorities for verification and further analysis will be established to concentrate on the most significant employment equity elements for that particular employer. This often means that the Compliance

Review Officer will choose to test or sample only specific areas, such as parts of the systems review work, to verify the appropriateness of the analysis completed.

Once the assessment is completed, the Compliance Review Officer may schedule an on-site visit or conduct telephone interviews to validate initial findings. The employer will be asked to schedule interviews with employees. The Compliance Review Officer will specify its logistical needs (such as a room in which to work, access to a computer, a security pass and so on) in order to better use the time on site. The time, date and duration of the on-site visit will be confirmed with the employer.

Step 3 – Verification

Objective: Validation of the information obtained

On-site visits can be an important component of the audit process. Special measures, good faith efforts, employees' knowledge of employment equity, climate in the workplace, unwritten policies and practices, these are all intangibles which may be best measured through personal, on-site assessments. Duration of on-site visits will depend on the size and structure of the organization and the extent of its Employment Equity Plan. Visits can include regional and field offices for large geographically dispersed organizations. During a visit, the Compliance Review Officer may ask to review additional documentation in order to verify significant findings identified through the Audit Questionnaire.

Officers may want to interview managers, union representatives and designated employee representatives. Interviews will be organized so as to minimize disruption to the employees' work. Employees will be interviewed in private, unless they ask to have other individuals present, and will not be identified in the audit report. Compliance Review Officers may also request permission to do a "walk-around" in order to observe the employer's operations directly, at which time they may speak extemporaneously with employees. This can also be the opportunity to assess the physical accessibility of the workplace. The employer may designate a staff person to accompany the Compliance Review Officer during any walk-around. It should be noted that the Compliance Review Officer may also decide to validate preliminary findings by way of telephone interviews.

The Compliance Review Officer will provide the employer with a debriefing on the findings, during the on-site visit, or by telephone depending on circumstances. The debriefing is to highlight major findings, both positive and negative, and to inform the employer of its compliance status. The debriefing is also an opportunity to initiate discussions on undertakings, as required. At this stage, the discussion will focus on those areas which require action, rather than specific ways to achieve results.

Step 4 – Reporting

Objective: Issuance of an audit report on compliance status

The objective of the reporting phase is to issue a report on the overall findings of the audit. The report will contain an evaluation of the employer's compliance with the requirements of the legislation, including observations on its accomplishments, the positive measures which the organization has implemented, and areas of improvements which the employer is required to address.

In cases of compliance, an audit report recommending compliance will be submitted to the Commission for approval. The report will then be provided to the employer and the audit will be concluded. In cases of non-compliance, the Compliance Review Officer will issue a report describing the findings of the audit and undertakings will be negotiated with the employer as prescribed by the Act.

Step 5 – Undertakings

Objective: Employer to redress areas of non-compliance

An undertaking is an agreement negotiated between the employer and the Compliance Review Officer should the employer be found in non-compliance with its legislative obligations. The Compliance Review Officer should be satisfied that the undertakings will result in the fulfilment of the statutory requirements and address the specific areas of non-compliance identified in the audit report. This activity should be concluded within 30 days. The Compliance Review Officer and the employer may have agreed on the general thrust at the debriefing session, with negotiation of detailed wording taking place within specified time frames.

The final text of the undertakings is approved by the appropriate manager at the Commission. A date is specified to implement each one. This timetable is required in order to ensure that the employer has a reasonable plan to enable the organization to meet compliance. If the employer contests a finding, additional documentation to support the employer's position will be requested. The employer will be given a time frame of a maximum of four months to implement the undertakings.

Employers will be asked to submit a report on the completion of their undertakings by a predetermined date, usually no longer than four months after their approval. The Compliance Review Officer will review the employer's report and validate the findings.

If the employer has not fulfilled its undertakings, adjustments may be considered if circumstances warrant, or the Commission may consider other actions, including enforcement action through the issuance of a Direction. If the Compliance Review Officer is satisfied that the employer has fulfilled the terms of the negotiated undertakings, an audit report will be submitted to the Commission for approval.

4. ENFORCEMENT OF THE ACT

Objective: Ensuring compliance through the issuance of a Direction by the Commission

There may be circumstances when finalizing the audit will present difficulties. A Direction may be issued by the Commission in three instances:

- (i) the employer has failed to cooperate with an audit, as provided for under Section 26(1) of the Act.
- (ii) the Compliance Review Officer has identified an instance of non-compliance but has been unsuccessful in negotiating an appropriate undertaking with the employer, as provided for under Section 25(2) of the Act;
- (iii) the employer has breached an undertaking as provided for under Section 25(3) of the Act.

If the Compliance Review Officer is unsuccessful in resolving these issues with an employer, such cases may be referred to the Commission which will consider issuing a Direction. Before this happens, the organization will be provided with a copy of the request for Direction by registered mail and given up to 30 days to convey its position in writing. The Commission will consider the request for a Direction along with the employer's response and decide whether to issue a Direction or adopt some other course of action. The employer will be duly informed of the Commission's decision.

If a Direction is issued under Sections 25(2) or (3), the employer may request a review of the Direction within 60 days; if a Direction is issued under Section 26(1) for lack of cooperation, the employer will have 30 days during which to request a review.

A Direction will be monitored in the same manner as all other undertakings. If an employer does not abide by a Direction, the Compliance Review Officer will attempt to obtain full compliance over a period of no more than 30 days. If compliance does not result, the Compliance Review Officer may inform the employer in writing, by registered mail, that the matter is being referred to the Commission with a recommendation that an application be made to an Employment Equity Review Tribunal for an Order confirming the Direction.

Should the Tribunal agree with the Commission, the Tribunal's order can be made an order of the Federal Court and enforced as such.

AUDIT STEPS ENFORCEMENT PHASE

