

LEAVE: ANNUAL LEAVE

All employees, as a condition of their employment are entitled to leave. There are a number of different types of leave, such as annual, maternity and sick leave, each of which is regulated differently. The Basic Conditions of Employment Act deals extensively with leave at chapter 3.

In this article we will address the regulation of annual leave and in our next article, we will deal with the remaining types of leave (sick, family responsibility etc). Our members in private practice who are employers are advised to familiarise themselves with this part of labour relations in order to prevent unnecessary conflict in their workplaces.

The Act provides for the absolute minimum amount of leave that must be granted to employees. Employers are free to grant leave in excess of the amounts referred to in the Act and provision for this should be made in the employment contract.

Chapter 3 of the Act does not apply to employees who work less than 24 hours a month for an employer, nor does it apply to agreements between employer and employee which grant employees leave in excess of their entitlement in terms of this Act (section 19). Therefore, should an employer, in the employment contract, grant more leave than is required by the Act and a dispute arises in respect of that additional leave, the aggrieved party will only have a remedy in contractual law and not in terms of this Act.

Section 20 of the Act deals with annual leave. It provides that employees are entitled to 21 consecutive day's annual leave on full remuneration in respect of each annual leave cycle. A leave cycle is the period of 12 months commencing from the first day of employment or commencing from the end of the previous leave cycle. A leave cycle is therefore not linked to the financial year of the employer nor to a calendar year (unless the employee commenced employment on a date which coincides with those dates). The employee must be paid for whatever number of normal working days fall within that 21 consecutive days. Usually this will equate to 15 working days if the employee is working a 5 day working week.

During the course of leave cycle, annual leave will accrue to the employee. In the absence of any other agreement, the annual leave will accrue at a rate of 1.25 days per month for an employee who works 5 days a week, or 1.5 days per month where an employee works a 6 day week. The Act, at section 20 (2)(b) &(c) provides that the employer and employee may

reach an agreement that the employee will accrue leave at a rate of 1 day for every 17 days worked or 1 hour for every 17 hours worked, but it must be stressed that a prior agreement must be in place for either party to rely on this method of accrual. There is no provision in the Act which entitles an employee to take annual leave not yet accrued (i.e. to have an advance on leave to be accrued). The employer may, at their sole discretion, grant such a request but are under no obligation to do so.

An employer is entitled to reduce the employee's entitlement to annual leave where the employee has taken "occasional leave" on full remuneration at their own request (section 20(7)).

It must be stressed that the employer may not require or permit an employee to work during any period of annual leave.

In the event that a public holiday occurs during a period that an employee is on annual leave, and that public holiday falls on the day on which the employee would ordinarily work, then the employee is entitled to an extra day annual leave for each such public holiday (section 20(8)).

There should be agreement between employer and employee regarding when annual leave may be taken. Section 20 (10)(b) provides that if no agreement can be reached then the employer has the right to determine when leave should be taken. Although it is not specifically provided for in the Act, the employer should not be unreasonable in the granting of leave. The employer may further have a policy in place, or make provision in the employment contract that, where there is a period of shut down (e.g. over the festive season), the employees are compelled to take annual leave. Again, the principles of reasonableness should guide the employer in this regard.

The employee is further entitled to take annual leave on consecutive days and the employer may not prevent the employee from doing so (section 20 (3)).

Annual leave which is not taken during the leave cycle is automatically carried over into the following leave cycle unless alternate provisions have been agreed to. In terms of section 20(4), an employer must grant annual leave not later than six months after the end of the annual leave cycle. If the employer does not do so, then the employee can demand to take

that annual leave from the previous cycle, and the employer may not refuse such permission.

Section 20(11) prohibits an employer from paying an employee instead of granting paid leave except on termination of employment.

The employer may not require an employee to take annual leave where they are entitled (and have such leave available) to other types of leave such as sick leave, family responsibility leave and so on. This is perhaps best illustrated by the following example. In the event that an employee falls ill during annual leave and is able to furnish an acceptable medical certificate to the employer then that period of illness should be converted to sick leave and the annual leave of the employee should be credited.

The employer may not force an employee to take annual leave during a notice period, and the employee is prohibited from taking annual leave during that notice period.

The payment that an employee is entitled to when on annual leave is governed by section 21 which provides that an employer must pay an employee leave pay at least equivalent to the remuneration that the employee would have received for working for a period equal to the period of annual leave, calculated at the employee's rate of remuneration immediately before the beginning of the period of annual leave. The section further provides that the employer must pay an employee leave pay before the beginning of the period of leave or, by agreement, on the employee's usual pay day.

In the next edition of the SAMA Insider, we will address the remaining types of leave. Our members in private practice are encouraged to contact the SAMA Governance and Legal Department if they have any questions regarding the leave granted to their employees. Those SAMA members in the public service are encouraged to contact the Industrial Relations department for assistance.

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