

LEAVE: SICK, MATERNITY AND FAMILY RESPONSIBILITY 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 our previous article (February 2010), we dealt comprehensively with the legislative provisions pertaining to annual leave. In this article, we will deal with the legislative provisions governing sick leave, maternity leave as well as family responsibility leave.

SICK LEAVE

Section 22 of the Act governs sick leave. Reference is made to a “sick leave cycle”. This means a three year (36 month) period of employment from the date of commencement of employment, or the conclusion of a previous sick leave cycle. In each sick leave cycle, an employee is entitled to an amount of paid sick leave equivalent to the number of days that they would ordinarily work during a period of six weeks.

It is important to note that an employer may not divide the sick leave into annual periods, ie 10 days per year for three years.

There is a limitation on the amount of sick leave that an employee is entitled to at the commencement of employment (section 22(3)). During the first six months of this first sick leave cycle, the employee is entitled to one day paid sick leave for every 26 days worked. This restriction does not affect the total amount of sick leave available to the employee for the full 36 month cycle, it merely limits the amount of sick leave that can be taken during the initial six months of employment. In subsequent sick leave cycles, there is no such limitation.

It must also be remembered that unused sick leave cannot be carried over into the next sick leave cycle. Unused sick leave merely falls away.

Further, employees who leave employment are not entitled to claim payment for unused sick leave nor are employers entitled to claim any amount back from employees who leave employment in the middle of a sick leave cycle but have already used up all their sick leave for that particular cycle.

In terms of Section 23 of the Act, an employer is not required to pay an employee for sick leave where that employee has been absent from work for more than two consecutive days or on more than two occasions during an eight week period and that employee has not, despite a request by the employer, furnished a medical certificate which states that the employee was unable to work for the duration of the absence due to sickness or injury.

The section provides further that the certificate must be issued by a medical practitioner or any other person who is certified to diagnose and treat patients, and who is registered with a professional council established by an Act of Parliament.

Should the employee fail to produce such a certificate then the period of absence must be treated as unpaid leave and cannot be deducted from paid annual leave.

Many employers have a policy that requires employees to produce a medical certificate if they are absent from work on a Friday, a Monday or both a Friday and a Monday, or where the employee is absent on the day before or after a public holiday. This is not permissible as the Act clearly provides that a certificate can only be requested where an employee is absent from work for more than two consecutive days (in other words, three days or more). Employers may rely on the provisions of section 23 (1) referred to above - where an employee is absent on more than two occasions in an eight week period, but specific reference to Fridays, Mondays and Public holidays is not allowed.

Application to Occupational Accidents or Diseases

In terms of section 24 of the Act, an employee who is unable to work due to an accident or occupational disease, as defined in the Compensation for Occupational Injuries and Diseases Act (130 of 1993), then any period of absence is not deducted from ordinarily sick leave, unless there is no compensation payable in terms of the COID Act.

MATERNITY LEAVE

Section 24 of the Act provides that employees are entitled to at least four months' maternity leave. The maternity leave may be taken at any time from four weeks one month before the expected date of birth of the child, unless there is an agreement to the contrary or on a date which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child

No employee may return to work for six weeks after the birth of the child unless a medical practitioner or midwife certifies that she is fit to do so (section 25(3)).

In the event that the employee suffers a miscarriage in the third trimester of the pregnancy or bears a stillborn child, that employee is still entitled to maternity leave for six weeks after the date of the miscarriage or still birth irrespective of whether the employee had already commenced maternity leave at the time of the miscarriage or stillbirth.

Section 25(5) places an obligation on the employee to notify her employer in writing, unless she is unable to do so, of the date on which she intends to commence maternity leave and return to work after this maternity leave. Such notification must be given at least four weeks prior to the commencement of the leave or where it is not “reasonable practicable” to do so, as soon as is reasonably practicable.

An employer is obliged to keep the employee's job open, and no employee may be dismissed on grounds of pregnancy, or for any reason in relation to pregnancy or intended pregnancy. In terms of section 187(1) of the Labour Relations Act, such a dismissal would be automatically unfair. This has the effect that the maximum amount of compensation that can be claimed by the employee so dismissed is doubled.

Maternity leave is unpaid leave, but the employer is free to make arrangements or policies that employee will receive some, or all of their salary and benefits during this period. Such arrangements do not enjoy statutory protection but can be enforced in contractual law.

An employee may

FAMILY RESPONSIBILITY LEAVE

Employees who have been in employment with the same employer for longer than 4 months, and who work more than 4 days per week for the employer are entitled to family responsibility leave.

The employee is entitled to three days family responsibility leave per annual leave cycle. As is the case with sick leave, unused family responsibility leave is not carried over into the next annual leave cycle and thus falls away.

Section 27(1) of the Act obliges the employer to grant the employee paid family responsibility leave, at the request of the employee only under the following circumstances:

- when the employee's child is born
- when the employee's child is sick
- upon the death of the employee's spouse or life partner, or the employee's parent, adoptive parent, grandparent, adopted child, grandchild or sibling.

An employee is entitled to take family responsibility leave in respect of the whole or part of the day (section 27(4)).

The employer is entitled to ask for proof of the event for which the family responsibility leave is sought, such as a medical or death certificate.

OTHER TYPES OF LEAVE

The Basic Conditions of Employment Act makes no reference to any entitlement to unpaid leave, study leave, paternity leave. Should an employer wish to grant these types of leave, provision must be made in their policies and employment contracts.

CONCLUSION

This concludes our survey of the legislative provisions pertaining to leave. It must be remembered that the employer is always free to provide higher amounts of annual, sick, family responsibility and maternity leave to their employees. Although these higher amounts, if granted, do not enjoy legislative protection, they do enjoy contractual protection. An employer may not grant additional leave in their policies and employment contracts and then unilaterally withdraw same relying on the fact that the Act only provides for a certain amount of leave.

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