

TERMS AND CONDITIONS OF EMPLOYMENT: BUSA & CCMA LABOUR ADVICE WEBTOOL FOR SMALL BUSINESS

TERMS AND CONDITIONS OF EMPLOYMENT

The Basic Conditions of Employment Act 75 of 1997 (the BCEA) establishes a floor of basic minimum rights for all employees. These rights are generally included in a contract of employment.

It is important to note, however, that some employees are covered by only some sections of the BCEA, while others are completely excluded from the BCEA. The information sheet: 'Exclusions from the BCEA' discusses this matter in more detail.

When contracting an employee, the following are some of the key provisions in the BCEA that an employer needs to be aware of:

REGULATION OF WORKING TIME (SECTIONS 7 – 9)

An employee may not work more than:

- 45 ordinary hours per week;
- 9 ordinary hours in any day if the employee works no more than 5 days a week;
- 8 ordinary hours a day if the employee works more than 5 days a week;
- An employee or worker (earning below the BCEA threshold) who works for less than 4 hours per day must be paid for at least 4 hours for that day.

Interpretation of “day” and “daily” when calculating periods of time

In **section 8** “day” and “daily” mean a period of 24 hours measured from the time the employee normally commences work. This is relevant to the application of sections 9 to 16.

Overtime (section 10)

Overtime work is not compulsory – there must be an agreement to work overtime in a contract of employment or collective agreement, or on an *ad hoc* basis.

An employee may not agree to work more than 10 hours overtime a week, but in terms of a collective agreement workers may work up to 15 hours per week for up to two months in any year (section 10(6(a)).

This is designed to cope with peak demand for labour, e.g. the agricultural industry.

By agreement workers may work up to **12 hours on any one day** (section 10(1A)).

Overtime payments (section 10)

- Overtime is paid at time and a half of the employee's wage for overtime worked
- It must be paid within one month of the overtime being worked.
- by agreement the employee can get paid time off in lieu of overtime pay at time and a half within one month of the employee becoming entitled to it.

Overtime payments are not included for the purposes of determining whether the employee falls within the threshold of earnings issued by the Minister of Labour from time to time in terms of section 6(3) of the BCEA.

Meal intervals (section 14)

- After five hours of continuous work, an employee is entitled to a meal interval of at least one continuous hour. Work is considered continuous unless interrupted by an interval of at least 60 minutes.
- Meal intervals are generally unpaid. However, an employee must be paid for a meal interval where the employee is required to work or be available for work.
- Meal intervals may be reduced to not less than 30 minutes by agreement in writing and may be dispensed with where the employee works fewer than 6 hours a day.

Daily and weekly rest periods (section 15)

An employee is entitled to:

- a daily rest period of 12 consecutive hours per day (this may be reduced to 10 hours if the employee lives on site and the employee has a meal interval of at least three hours);
- a weekly period of 36 consecutive hours which, unless otherwise agreed, must include a Sunday.

Sunday work (section 16)

An employee is entitled to the following:

- if Sunday is a normal working day (which may be on a rotating shift), an employee must be paid at time and a half for the hours actually worked.
- if Sunday is not a normal working day, an employee must be paid at double time for the time actually worked, with a minimum of one day's wages.
- if a shift spans Saturday and Sunday and more than half the shift falls on Sunday, the employee must be paid at Sunday rates for the whole shift. However, if half or more of the shift falls on the Saturday the employee must be paid at Saturday rates for the whole shift.
- employees may be granted paid time off equivalent to the rate they would have received for their Sunday work. This leave must be granted within a month of the employee becoming entitled to it. However, by written agreement the employee could take the leave up to 12 months after becoming entitled to it. In that sense the leave can be 'banked' until a time when it is more convenient for the employee to take leave.
- in certain sectors, such as retail, the sectoral determination provides that Sunday may be paid at an ordinary rate of pay provided that the employee works no more than 40 hours in a week, and on no more than 3 consecutive Sundays.

Night work between 18h00 and 06h00 (section 17)

Night work between 18h00 and 06h00 is only permitted if:

- the employee agrees to the night work; and
- the employee is compensated for the night work either in the form of a shift allowance (no rate is prescribed by law) or by a reduction of working hours; and
- transportation is available between the employee's place of residence and the workplace at the start and end of the employee's shift (this must be available, but it is not required that the employer pay for this).
- night work that is performed on a regular basis between 23h00 and 06h00 is only permitted if the employer provides information about any health and safety hazards associated with this type of work and the employee's right to undergo a medical examination. The

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employer is required to facilitate and pay for the medical examination when the employee requests the examination.

- collective agreements may make provision for night work.

Public holidays (section 18)

It is not compulsory to work on a public holiday, but this may be required in terms of an agreement (collective agreement or individual contract).

An employee is entitled to the following:

- if the employee works on a public holiday which falls on a day on which he would ordinarily have worked, the employee is entitled to the greater of double time OR an ordinary day's pay plus what the employee actually earned on that day (typically if this was hourly pay and the employee did not work a full day s/he would still get double pay);
- if the employee works on a public holiday on which s/he would not ordinarily have worked, the ordinary day's pay plus the amount actually earned that day;
- if the employee does not work on a public holiday which falls on a day on which an employee would ordinarily have worked the employee must be paid at the normal rate of pay.

LEAVE

Annual leave (section 20)

- An employee is entitled to 21 consecutive days' annual leave per 12 month leave cycle on full remuneration.
- Leave accrues at the rate of one day for every 17 days worked or one hour for every 17 hours worked.
- As a general rule annual leave must be taken no later than 6 months after the end of the annual leave cycle. It is unclear whether the BCEA permits employees to accumulate leave not taken within 6 months of the end of the leave cycle. The Labour Court has clarified section 20 of the BCEA contemplates that claims for the value of accrued leave are limited to statutory annual leave accrued in the current and immediately preceding leave cycles. An employee does not forfeit that leave or any claim to its value if for whatever reason, the leave is not taken in the six-month period contemplated by s 20 (4).

- Annual leave may not be taken during any period in which the employee is entitled to other leave or during any notice period, so leave must run consecutively not concurrently.
- Leave must be taken at a time agreed between the employer and employee or, if there is no agreement, at a time determined by the employer.
- Depending on the collective agreements in place, there may be a distinction between annual leave and an annual shutdown by the employer.

Pay for annual leave (section 21)

- An employer must pay an employee his/her full leave pay before the beginning of the period of leave or, by agreement, on the employee's usual pay day.

Sick leave (section 22)

- An employee is entitled to an amount of paid sick leave (per sick leave cycle of 36 months) equal to the number of days the employee would normally work during a period of six weeks. Thus, a person who works 2 days a week is entitled to 2 days X 6 weeks, i.e. 12 days leave in a 3-year cycle.
- During the first 6 months of employment sick leave accrues at the rate of 1 day for every 26 days worked.
- Sick leave is paid at an employee's normal rate of pay. However, the amount of sick leave pay may be reduced by agreement if the number of sick days is increased commensurate with the decrease in pay and the employee is paid at least 75% of the usual daily wage for any day of sick leave.
- An employee need not be paid for sick leave where the employee is absent from work for more than two consecutive days or on more than two occasions in an 8-week period and, on request by the employer does not produce a medical certificate stating that the employee was unable to work for the relevant period of absence.
- The medical certificate must be issued and signed by a medical practitioner, or any other person certified to diagnose and treat patients and who is registered with a professional council, like the Health Professions Council of SA (HPCSA) or the South African Nursing Council (SANC).

- Medical certificates from traditional healers will only be accepted if the traditional healer is registered with the Traditional Health Practitioners Council of SA. The employee must provide proof of registration if s/he presents such a certificate as proof of incapacity.

Maternity leave (section 25)

- An employee is entitled to 4 consecutive months' maternity leave – this is not paid leave and the purpose of this leave is a guarantee that the employee can return to work after the baby is born. Payment is only due from the employer by agreement, or from the Unemployment Insurance Fund if the mother is a contributor in terms of the Unemployment Insurance Act.
- An employee may not work for 6 weeks after the birth of her child unless a medical practitioner or midwife certifies that she is fit to do so.
- An employee is protected against discrimination on account of her pregnancy in terms of the EEA.
- The employee is required to notify the employer of the date she intends to commence maternity leave and the date of her intended return. That notification must be given 4 weeks prior to commencing maternity leave unless that is not reasonably practicable. Of course, if the employee had, for example, planned to take only 3 months' leave but decides after the baby is born that she will need another month, she must inform the employer. If the employer refuses to allow her the additional month, this may probably be a breach of the EEA, because it may be found to be conduct unfavourable to the woman by reason of her pregnancy.

Parental leave (section 25A)

- In terms of section 25A of the BCEA, an employee who is a parent of a child is entitled to 10 consecutive days' unpaid parental leave.
- Parental leave may commence on the day that the child is born. The 10 consecutive days' parental leave are calendar days, not working days.
- An employee who contributes to the Unemployment Insurance Fund may submit an application (form UI 2.9) for parental benefits to the Department of Employment and Labour in terms of section 26B of the Unemployment Insurance Act (UIA).

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Adoption leave (section 25B)

- This category relates to the adoption of a child that is below the age of two.
- A single adoptive parent is entitled to 10 consecutive weeks unpaid adoption leave. If there are two adoptive parents, only one would be entitled to 10 consecutive weeks' adoption leave. However, the other adoptive parent would be entitled to 10 consecutive days normal parental leave (see information on parental leave above).
- It is up to the adoptive parents to decide who takes adoption leave and who takes parental leave.
- Leave commences on the day that the adoption order is granted, or the day that a court places the child in the care of an adoptive parent.
- An employee who contributes to the Unemployment Insurance Fund may submit an application for adoption benefits to the Department of Employment and Labour in terms of section 26B of the UIA.

Commissioning parental leave (section 25C)

- Commissioning parental leave relates to surrogate motherhood.
- If there are two commissioning parents, they can choose: if the one takes commissioning parental leave, the other can take normal parental leave. The one who takes commissioning parental leave will be entitled to 10 consecutive weeks unpaid commissioning parental leave. The other parent would be entitled to 10 consecutive days normal unpaid parental leave (see information on parental leave above).
- An employee who contributes to the Unemployment Insurance Fund may submit an application for commissioning parental benefits to the Department of Employment and Labour in terms of section 29 B of the UIA using form UI 2.9.

Protection of employees before and after the birth of a child (section 26)

- A pregnant employee or an employee who is nursing her child may not perform any work that is hazardous to the health of the employee or the baby.

- If the employee performs night work or her work poses a hazard to her or the baby, during an employee's pregnancy and for 6 months after the birth of the child the employer must offer the employee suitable alternative work on terms and conditions not less favourable than her ordinary terms and conditions, if it is practicable to do so.
- The Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child was issued in terms of the BCEA and provides a useful guide as to what is required from employers in this context.

Family responsibility leave (section 27)

The 2018 amendments to the BCEA include the removal of "birth of a child" as a statutory ground for taking Family Responsibility Leave.

If an employee:

- has worked for an employer for more than 4 months; and
- works more than 4 days a week for that employer;
- the employee is entitled to 3 days' paid leave in an annual leave cycle to be taken, if the employee's child is sick or for the death of an immediate family member (spouse, life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling).

Before paying an employee for leave in terms of this section, the employer may require reasonable proof of the event giving rise to the need for the leave.

Collective agreements may contain special provisions relating to family responsibility leave.

PARTICULARS OF EMPLOYMENT AND REMUNERATION (SECTIONS 28 AND 29)

Employers are required to provide employees on commencement of employment with a number of specific details relating to their employment in writing.

All employees (including employees in the domestic sector) are entitled to all the information listed in section 29 (a) to (p) except where an employer employs fewer than five workers. In that case, the employees

concerned are not entitled to descriptions of any council or sectoral determination covering the employer's business; any period of employment with a previous employer that counts towards the employee's period of employment and a list of any other documents that form part of the contract of employment and access to such documents.

It is worth noting that, although the BCEA requires the employer to supply employees with particulars of employment it does not mean that it is a requirement that a contract of employment must be in writing in order to be valid. It is however advisable to conclude contracts of employment in writing as it will assist to determine the true nature of the employment relationship if it ever becomes the subject of a dispute between the parties, e.g., an unfair dismissal dispute.

Written particulars of employment must be kept for a period of 3 years after the termination of employment.

Remuneration (sections 32 and 33)

- An employer must pay to an employee any remuneration that is payable in money in SA currency, by cash, cheque or direct deposit into an account designated by the employee either daily, weekly, fortnightly or monthly.
- Remuneration must be paid not later than 7 days after the completion of the period for which the remuneration is paid or the termination of the contract of employment.
- An employer is required to provide the employee with information in writing each time the employee is paid. This information includes:
 - the full name and address of the employer;
 - the employee's name and occupation;
 - the period for which payment is being made;
 - the employee's remuneration in money;
 - amount and purpose of any deduction;
 - the actual amount paid to the employee.

Deductions (sections 34 and 34A)

An employer may not deduct money from an employee's remuneration unless:

- the employee consents in writing to the specific deduction; or

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- a law, a collective agreement, Court Order or Arbitration Award permits the deduction.

Deductions may only be made to reimburse an employer for damage or loss if:

- the loss or damage occurred in the course of employment and was due to the fault of the employee;
- the employer has followed a fair procedure and given the employee an opportunity to say why the deduction should not be made;
- the total amount of the debt does not exceed the total amount of the loss or damage; and
- the total deductions per pay period do not exceed one quarter (25%) of the employee's remuneration in money for that period.

If an employer deducts any money from an employee's remuneration for payment to a benefit fund (e.g. pension fund, medical aid scheme, etc.) the employer is obliged to pay such monies over to the fund concerned within 7 days of the date the money was deducted, or a shorter period in the event that the rules of such a fund may require this. A schedule of payments must be made available to the relevant fund by no later than the 15th of the month following the contribution payment.

Calculation of remuneration and wages (section 35)

- The BCEA provides for the calculation of wages and remuneration. A wage is a narrower term than remuneration. The employee's wage is calculated according to the ordinary working hours of the employee, which is deemed (unless otherwise proved) to be 45 hours per week.
- An employee's monthly remuneration or wage is four and one-third (4.33) times the weekly remuneration or wage respectively.
- The Minister has determined that the following payments are included in remuneration for the purpose of calculating leave pay and notice pay: housing allowance; car allowance (but not the provision of a car if it is to enable the employee to work); any other cash payment (excluding discretionary bonuses and tips); company contributions to medical aid, pension, provident funds, funeral or death benefit schemes or similar schemes. The following are excluded: transport allowances (to enable an employee to work); relocation allowances, tips and gifts (from customers or employers);

share incentive schemes; discretionary payments (e.g. bonuses); entertainment, education or schooling allowances.

- If an employee's remuneration fluctuates it must be averaged over a period of 13 weeks.
- Note that when a CCMA commissioner calculates earnings for the purposes of making a compensation award as a result of an unfair dismissal, the commissioner will utilise the statutory minimum wage or amount set out in a sectoral agreement or collective agreement, whichever applies, in the event that an employer has been paying that employee below that rate.

NOTICE OF TERMINATION OF EMPLOYMENT (SECTION 37)

A party must give at least the following notice of termination of employment:

- one week if an employee has been employed for six months or less;
- two weeks if an employee has been employed for between six and twelve months;
- four weeks if the employee has been employed for more than one year; this can be reduced to two weeks by collective agreement.
- four weeks for a farm worker or domestic worker who has been employed for more than six months.

The BCEA recognises an employer's common law right to terminate the contract of employment without notice. That would be permissible where the employee has committed a material breach of the contract of employment such as serious misconduct. Dismissal without notice is known as summary dismissal and.

The period of notice is not interrupted if the employee takes sick leave during the notice period.

Payment instead of notice (section 38)

- An employer may pay an employee what s/he would have earned during the notice period instead of having the employee work out the notice period. Whether that happens is up to the employer; the employee has no choice in the matter, unless by agreement including a contract, sectoral determination or collective agreement.

- If the employee gives notice the employer may waive its right to have the employee work out his notice and instead pay the employee what s/he would have earned if s/he had stayed to work out the notice period.

Payment on termination

On termination an employee must be paid for overtime and Sunday work that has been worked but not paid yet.

Accrued leave for the incomplete, current leave cycle if the employee was employed for longer than 4 months.

Severance pay (section 41)

- An employer must pay an employee who is dismissed for operational requirements (redundancy of the employee's position) severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.
- In terms of s84 an employee's length of service with an employer includes any previous period of employment provided the break in service was for less than one year.
- An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay.
- An employee who accepts any offer of alternative employment from the employer also forfeits any claim to severance pay.
- An employer is required to pay severance pay to an employee if employment is terminated because the employer goes insolvent (section 38 Insolvency Act 24 of 1936).
- An employer who employs an employee in terms of a fixed-term contract for a specific project that has a limited or defined duration, for a period exceeding 24 months must, subject to the terms of a collective agreement, pay the employee on expiry of the contract, one week's remuneration for each completed year of the contract (section 198B (10) (a) of the Labour Relations Act 66 of 1995).

Section 74(3) of the BCEA permits an employee who refers a severance pay dispute to the CCMA or a bargaining council to initiate a claim for any other amount owed as a result of a contravention of the BCEA, jointly with the severance pay claim. This would require the

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employee to refer to such claim in the LRA 7.11 referral form. Applicants in severance pay disputes should clearly stipulate in their referral forms whether they are also claiming amounts that are outstanding in terms of the BCEA.

PROHIBITION OF EMPLOYMENT OF CHILDREN AND CHILD LABOUR (SECTIONS 43-48)

In terms of the BCEA-

- no person may require or permit a child who is under 15 years of age to work. This is a criminal offence.
- the Minister may in terms of section 50 vary this provision by allowing children under 15 years to be employed in advertising, sports, artistic or cultural activities.
- any employment that is permitted must be appropriate to the age of the child and may not place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.
- all forced labour is prohibited.

BCEA ENFORCEMENT PROCEDURES

- The BCEA apply to workers and employees.
- The function of labour inspectors has been expanded to include enforcement of the national minimum wage.
- A labour inspector may try to secure a written undertaking or issue a compliance order if he or she believes that there is non-compliance.
- If the employer fails to comply with the written undertaking or compliance order, the Director General may request the CCMA to make the undertaking or compliance order an Arbitration Award.
- A labour inspector may issue a compliance order if he believes that there is non-compliance.
- An employer must comply with the compliance order, unless the employer refers a dispute to the CCMA within the time period stipulated in the compliance order.
- The labour inspector may not issue a compliance order in respect of the BCEA or NMWA if:
 - the employee earns above the BCEA threshold;

- any proceedings have been instituted for the recovery of the amount in the CCMA / a Court;
- the amount has been payable for longer than 36 months.
- The Director General may apply to the CCMA for the compliance order to be made an Arbitration Award, if the employer did not comply with the order.
- The CCMA may issue an arbitration award if it is satisfied that:
 - the compliance order was served on the employer;
 - the employer has not referred a dispute in terms of s69(5) of the BCEA.
- Any employee/worker may refer a dispute to the CCMA concerning the failure to pay an amount owing to him or in terms of the national minimum wage, a contract of employment, a collective agreement or a sectoral agreement, if that employee earns below the BCEA threshold.
- The CCMA must appoint a Commissioner to attend to the matter as a con/arb – no objection allowed.
- If a worker/employee earns above the threshold he or she can refer a payment dispute to the Labour Court, High Court, Magistrates Court or Small Claims Court.
- Interest is payable on moneys owed in terms of the BCEA and NMWA.
- A fine may be imposed on an employer who failed to pay a worker the minimum wage.
- The employer must prove compliance and accurate record keeping.

Every employee has the right to:

- Complain to a trade union representative or labour inspector about an alleged failure to comply with the BCEA or NMWA;
- Discuss his conditions of employment with his fellow employees, his employer or any other person;
- Refuse to comply with instructions contrary to the BCEA and NMWA, or Sectoral Determination;
- Refuse to agree to any term and condition of employment contrary to the BCEA, NMWA or Sectoral Determination;
- Inspect any record that relates to his employment;
- Request a trade union representative or labour inspector to inspect a record on his behalf; and

- Any trade union representative has the right to inspect any record relating to that employee.

For the purposes of the protection of employee rights, a job applicant and a former employee are deemed to be employees.

Employees may not be discriminated against for exercising any of their rights in terms of the BCEA.

- If there is a dispute about the interpretation or application of the protection of an employee's rights in terms of s79 of the BCEA such as a dispute may be referred to the CCMA for conciliation and, if unresolved, to the CCMA for Arbitration.

LEGISLATIONS

- Basic Condition of Employment Act 75 of 1997
- National Minimum Wage Act 9 of 2018