

OVERVIEW OF THE POST 2018 AMENDMENTS TO THE BASIC CONDITIONS OF EMPLOYMENT (BCEA)



INTRODUCTION AND PURPOSE

The amendments to the BCEA are introduced generally to improve the enforcement of provisions of the Act, and particularly the effective enforcement of the proposed National Minimum Wage Act. The amendments serve to do the following:

- Provide for new kinds of parental leave and benefits.
- Repeal the provisions dealing with the powers and functions of the Employment Conditions Commission.
- Extend the provisions for the monitoring and enforcement by the labour inspectorate to include compliance with the national minimum wage and unemployment insurance requirements.
- Extend the jurisdiction of the CCMA to include enforcement procedures and claims for underpayment in terms of the Act, the national minimum wage, unemployment insurance legislation, and claims arising from employment contracts and collective agreements.
- Extend the jurisdiction of the CCMA to the arbitration of disputes relating to the interpretation and application of matters arising from section 80 (protection of employees against discrimination).

A “worker”, namely “any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind”, is entitled to the protections of the BCEA as far as these relate to the enforcement provisions concerning the national minimum wage.

PARENTAL LEAVE AND BENEFITS

The amendments to the BCEA, effective 1 January 2020, brought about through the promulgation of the Labour Laws Amendments Act, include the removal of “birth of a child” as a statutory ground for taking Family Responsibility Leave. In terms of section 25A of the BCEA, an employee who is a parent of a child will be 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 apply (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).

ADOPTION LEAVE AND BENEFITS

This category relates to the adoption of a child under the age of two. The right to such leave commenced on 1 January 2020.

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 normal 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 under section 26B of the UIA.

COMMISSIONING PARENTAL LEAVE AND BENEFITS

Commissioning parental leave relates to surrogate motherhood. The right to such leave commenced on 1 January 2020. The leave commences on the day the child is born as a result of a surrogacy agreement. If there are two commissioning parents, they can choose: if 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).

DAILY WAGE PAYMENT

The amendments to the BCEA, in terms of section 9A, also introduce the provision that where an employee or a worker works for less than four hours on any day, that employee or worker must be paid for four hours on that day.

This provision only applies to employees or workers not earning more than the earnings threshold set by the Minister in terms of section 6(3) of the BCEA.

SECURING AN UNDERTAKING / ISSUING A COMPLIANCE ORDER

The amended sections 68(1) and 69(1) of the BCEA enables a labour inspector who has reasonable grounds to believe that the employer has not complied with any provisions of

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the BCEA, the National Minimum Wage Act, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act, to attempt to secure a written undertaking by the employer to comply with the provision or may issue a compliance order. If the employer fails to comply with the written undertaking to comply, or the compliance order, the Department of Employment and Labour may request (written undertaking) or apply (compliance order) to the CCMA to make the undertaking/compliance order an arbitration award.

The time for compliance stipulated in the written undertaking or compliance order must have lapsed before an application or request can be made to the CCMA to have the latter made an arbitration award.

The CCMA may issue an arbitration award requiring the employer to comply with the compliance order if it is satisfied that –

- (a) the compliance order was served on the employer; and
- (b) the employer has not referred a dispute in terms of section 69(5) of the BCEA.

Once the compliance order or written undertaking has been made an arbitration award, the Department of Employment and Labour can apply to the CCMA to have it enforced in terms of section 143 of the Labour Relations Act 66 of 1995.

CHALLENGE TO A COMPLIANCE ORDER

An employer must comply with a compliance order within the time period stated in the order unless the employer refers a dispute concerning the compliance order to the CCMA within that period. A copy of the referral must be served on all parties concerned.

FINE FOR NOT COMPLYING WITH THE NATIONAL MINIMUM WAGE

Section 76A imposes the following sanction for not complying with the national minimum wage-

Whichever is the greater of-

- (a) twice the value of the underpayment; or
- (b) twice the employee's monthly wage.

For second, or further non-compliance, the fine that the employer will be required to pay an amount that is the greater of –

- (a) thrice the value of the underpayment; or
- (b) thrice the employee's monthly wage.

The Department of Employment and Labour is required to publish on its official website a list of all employers who were issued with compliance orders.

CLAIMS FOR FAILURE TO PAY ANY AMOUNT

In terms of section 73A of the BCEA, any employee or worker who earns less than the BCEA threshold, may refer to the CCMA a dispute concerning any failure to pay any amount owing to that person in terms of the BCEA, the National Minimum Wage Act, a contract of employment, a sectoral determination or a collective agreement. The application form can be downloaded from the CCMA Website (<https://www.ccma.org.za/advicecategories/ccma-referral-forms/>).

An employee or a worker earning above the threshold may refer such a claim to the Labour Court, High Court or, subject

to their jurisdiction, the Magistrate's Court or the Small Claims Court.

CONSOLIDATION OF PROCEEDINGS

Section 74 of the BCEA provides for any dispute concerning a contravention of the BCEA or the National Minimum Wage Act may be instituted jointly with proceedings in respect of-

- alleged unfair dismissal;
- entitlement over severance pay; and
- alleged discrimination in terms of the BCEA.

RELEVANT LEGISLATION

- Basic Conditions of Employment Amendment Act 7 of 2018.
- Labour Laws Amendment Act 10 of 2018.
- National Minimum Wage Act 9 of 2018.
- Unemployment Insurance Act 63 of 2001.
- Unemployment Insurance Contributions Act 4 of 2002.