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EMPLOYMENT

Parental leave – a pending new entitlement as a minimum term of employment

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Currently, South African employment laws provide minimum entitlements to specified leave types for all employees, such as annual leave, sick leave, family responsibility leave, and unpaid maternity leave of four months for female employees. These entitlements originate in the Basic Conditions of Employment Act, 75 of 1997 ("**BCEA**"). A proposed amendment to the BCEA has recently been passed by the South African Parliament in the form of the *Labour Laws Amendment Bill* (**"the Bill"**) which would introduce, for the first time, the new leave type of Parental Leave. Although passed by Parliament, this Bill still needs to go through the National Council of Provinces and then be signed by the President.

The Bill specifies that an employee who is a parent of a child will be entitled to 10 days parental leave, which may be granted from the day of the child's birth or the day of the granting of a child's adoption order.

The Bill does not specify paternity leave but rather makes provision for Parental Leave, which could apply to both male and female employees. For this reason, the *Labour Laws Amendment Bill* is unclear how this Parental Leave type is going to complement maternity leave; i.e. if a female employee takes maternity leave, is she also entitled to Parental Leave? The wording of the Bill does not seem to exclude this. Although an explanatory memorandum to the Bill states that the intention of the insertion of the provisions is so that –

"an employee who is a parent and who is not entitled to maternity leave, is entitled to 10 days parental leave when that employee's child is born or when an adoption order is granted."

The underlined wording didn't make it into the Bill, and there is the possibility for some confusion as a result. It may be that the Bill, once assented and enacted, will clarify this position. This appears to be a possibility, especially taking into account that a number of representations made during the debating of the Bill related to recommendations that Parental Leave should exclude female employees already benefitting from maternity leave.

Adoption Leave is also provided for whereby an employee who is an adoptive parent will be entitled to ten weeks consecutive Adoption Leave. The Bill specifies that if an adoption order is granted in respect of two parents, one parent will be entitled to Adoption Leave (ten weeks) and the other to Parental Leave (ten days).

At present however, it is clear that male employees who become a parent will now be entitled to at least the 10 days Parental Leave.

Although Parental Leave has been widely touted in the media as a paid form of Paternity Leave, this is in fact an unpaid leave by the employer. Although there is no obligation on the part of an employer to pay any salary to an employee who takes such leave, payment to the employee will come from the South African Unemployment Insurance Fund ("**UIF**") (with an additional requirement from a further amendment to the Unemployment Insurance Act by the Bill that the person must have 13 weeks of prior employment). This is a similar employer non-payment/UIF benefit structure that applies with maternity leave, which is unpaid by the employer but which entitles the female employee to claim a portion of salary from the UIF.

Largely, these amendments have been made to cater for the best interests of children in families with working and/or adoptive parents. These amendments will also provide benefits and equal treatment for families in the LBGTQI community. Previously, same sex partners would not be able to take leave upon the adoption of a child/birth of a child, or where a birth took place after being carried by a surrogate. Provision of Parental and Adoption Leave provides a solution to this problem and has been widely praised as another example of the progressive nature of South African law.

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