

## A constitutional rebirth for leave provisions in relation to parents

### October 2018

On 28 November 2017, the National Assembly passed the first-ever private member's bill to amend the Basic Conditions Employment Act 75 of 1997 (BCEA). The amendment bill, further adopted by the National Council of Provinces on 21 August 2018, among other things, provides for parental leave (applicable to parents not entitled to maternity leave), adoption leave (which until now has not been available as a right), and “commissioning parental leave”, a form of leave available to persons who come to parenthood through surrogacy.

The previous position was a provision for maternity leave as well as family responsibility leave only. Under section 25 of the BCEA, a working mother is entitled to at least four consecutive months of maternity leave, and an employee who has a miscarriage during her third trimester or bears a stillborn child is entitled to six weeks of maternity leave.

In addition, section 27 of the BCEA provides for what is known as family responsibility leave, which entitles an eligible employee (one who has been in a job for at least four months and who works at least four days a week) to three days of leave every year in the event of birth, sickness, or death of that employee's child or death of a spouse or other close relatives, including an adopted child.

It must be highlighted that the previous position was perceived as discriminatory by social rights activists on the basis that the benefits for the female parents were greater than those of the male parents, which meant that same sex male parents and women who are unable to bear their own children, did not enjoy the same rights, both in adoption and surrogacy. The amendments seek to extend leave for not only biological parents, but also parents who adopt or act as a surrogate.

- The first category is *parental leave* that relates to the birth of a child. An employee who is a parent of a child will be entitled to 10 consecutive days' parental leave. The employee will have to give at least one month's written notice of the date of the expected date of birth or adoption, as well as when the leave is due to commence and when the employee will return.
- The second category is *adoption leave*, which relates to the adoption of a child below the age of two. Adoptive parents are entitled to ten consecutive days' leave, commencing on the

day that the adoption order is granted. The notice requirements will be the same as for parental leave. If there are two adoptive parents, they can choose: if the one take parental leave (10 weeks), the other will take adoption leave (10 days). Employers should take cognisance of a scenario where the two adoptive parents could be from the same workplace. In this respect, we suggest that the two adopting parents should be engaged, well in advance, on the taking of either parental leave or adoption leave, with a view to minimising disruption to their functions and related operational duties.

- Finally, there is *commissioning parental leave* that relates to surrogacy. The surrogate parent (primary commissioning parent) will be entitled to commissioning parental leave. If there are two surrogate 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' leave while the other will be entitled to 10 consecutive days' normal parental leave. In both cases leave can commence on the date of the birth of the child. The notice requirements will be the same as stated herein for parental and adoption leave.

Notably, in terms of the new amendment, family responsibility will no longer apply as all parents will be covered under the above three categories of leave. These forms of leave will be financed through the UIF Fund, once the UIF Act is also amended. Following these amendments becoming the law, employers will be expected to review their policies to cater for these new forms of leave for parents.

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