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IMPORTANT GUIDELINES ON ANNUAL AND SICK LEAVE DURING THE LOCK DOWN PERIOD



Arguably the most contentious labour issue at present in South Africa is whether an employer can force an employee to take and/or use their annual leave during the lockdown period.

The starting point is to move away from the term “force” and to understand that an employer needs to explore this as a forced and/or mandatory option.

When we unpack the existing legal provisions against the fundamental extraordinary regulations, we can see that an employer may require an employee to take annual leave, provided that the following provisions are clearly understood and appreciated by both employers and employees. Further an employer cannot utilize annual leave to remunerate an employee who is still and or actively working from home.

For the purpose of this blog, let's see what the Constitution of South Africa says.

The Constitution of South Africa and Basic Conditions of Employment Act (BCEA)

Section 36 of the ***Constitution of South Africa Act 108 of 1996*** states that:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

The Constitution provides for a gateway in the form of various pieces of employment legislation to ensure fair labour practices. One such piece of legislation is the ***Basic Conditions of Employment Act 77 of 1997 (BCEA)***. **Section 20(10)** of the BCEA states that, annual leave must be taken—

1. In accordance with an agreement between the Employer and the Employee; or
2. If there is no agreement in terms of paragraph (a), at a time determined by the Employer in accordance with Section 20.

Conflicts between written published directives versus verbal communication from the Department of Employment and Labour

- o In terms of the *Temporary Employee / Employer Relief Scheme (TERS)* signed on 25 March 2020, the Preamble of the said Directive states that Companies would have to shut down and Employees laid off during the lockdown period. The Preamble further states that Employees are forced to take leave, which is not out of choice.
- o To further compound this confusion, as part of the application process for TERS relief, the requirement for Leave Income, according to the Department of Labour, is defined as the remuneration that the employee will receive for the lockdown period, including the value of paid leave.
- o In terms of the *COVID-19: Implications on the Basic Conditions of Employment Act No. 75 of 1997 (BCEA), Leave Provisions* signed on 26 March 2020, an Employee may be requested by the Employer to take annual leave from his/her annual leave credits as the BCEA allows Employers to determine the time that Employees can take their annual leave.

The Bargaining Council supports the utilisation of annual leave

The National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI)–

- o allowed for Employers to request access to annual leave pay held by the Council on behalf of the Employees, subject to written confirmation by the Employer and Employee.
- o stated in a circular dated 31 March 2020 that, in the absence of such written confirmation, the Employer must take responsibility for any potential compliance matter.

How do you deal with sick leave during this period?

Sections 22 and 23 of the BCEA regulate sick leave entitlements.

- An Employee can use his or her sick leave entitlement if a medical practitioner had recommended self-isolation.
- Alternatively, where an employee has been quarantined for 14 days, the Illness Benefit under the UIF process will be applicable.
- A confirmation letter from both the employer and the employee must be submitted, which will stand in place of a medical certificate as the employee would have self-quarantined without prior consultation with a medical practitioner.
- Should an employee be quarantined for more than 14 days, a medical certificate from a medical practitioner must be submitted together with the relevant UIF application documentation.

We at *SERR Synergy* strive to provide professional assistance to employers who require solutions and comprehensive legal arguments in relation to any unique problem that they may potentially face in relation to the use of annual leave during the *shutdown period*. Our aim is not to support or discredit any argument pertaining to annual leave during these challenging times, but rather to tailor our advice to the needs of each employer who requires our assistance. *In an attempt to alleviate the constraints imposed by COVID-19, Government has announced measures and indicated the introduction of further assistance, especially to smaller businesses.* We will keep businesses informed of such measures.

About the Author: Jared Francis joined SERR Synergy in October 2016, and currently holds the title of KZN Labour Manager. He is an admitted attorney who has practised in KZN and Gauteng and has more than 10 years' experience in the legal and industrial relations field respectively. He holds an LLB degree, a Post-Graduate Diploma in Industrial Relations and a Post-Graduate Certificate in Forensic Investigation from the University of KwaZulu-Natal. He also holds Post-Graduate Certificates in Advanced Labour Law, Corporate Law, Advanced Human Resource Management and Health and Safety from UNISA. He is currently studying towards his MBA.

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