

South Africa¹

Ameeta Jaga and Feranaaz Farista (University of Cape Town)²

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For comparisons with other countries in this review on leave provision and early childhood education and care services, please see the cross-country tables at the front of the review (also available individually on the Leave Network website). To contact authors of country notes, see the members page on the Leave Network website.

Note on leave information: South Africa is governed as a constitutional democracy with a three-tiered interdependent governmental structure – i.e., national, provincial, and local. Leave entitlement in the South African context is primarily through one main statute that applies to the whole country, namely, the Basic Conditions of Employment Act (BCEA) (Act No. 75 of 1997, as amended). Though there are nine provinces in South Africa, they do not have the authority to develop or amend any leave provision standards. The BCEA sets the minimum standards for leave provision in the country, except for the following exclusions: the National Defence Force, National Intelligence Agency, or SA Secret Service, workers who work fewer than 24 hours per month and unpaid volunteers working for an organisation with a charitable purpose. There are two other mechanisms that can have an influence on leave determinations, and those are: a collective agreement (in terms of section 213 of the SA Labour Relations Act (LRA), (Act 66 of 1995 as amended.) and sectoral determinations (in terms of chapter 1 section 1 of the SA Basic Conditions of Employment Act (BCEA), (Act 75 of 1997 as amended).

Collective agreements

A collective agreement is a written agreement concerning terms and conditions of employment (or any other matter of mutual interest): it is concluded by, on the one hand, one or more registered trade unions, and, on the other, one or more

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² We thank Bristol Buys for his expert guidance and review of this country note. Our thanks go to Herman Kasselmann for his longstanding contribution to the South African country note.

employers or one or more registered employers' organisations – section 213 of the LRA. Certain limitations do, however, exist in terms of the two parties' contractual freedom.

Sectoral determinations

A sectoral determination is not an agreement: it is a determination made by the Minister of Employment and Labour, in terms of Chapter Eight of the BCEA, and, before making a sectoral determination for employees in an area or sector, the Minister of Employment and Labour is required to direct the Director-General: Labour to investigate conditions of employment in the sector or area concerned.

Please take note that collective agreements and sectoral determinations are, indeed, separate legal instruments governed by two different acts (the LRA and the BCEA, respectively) – as such, they have different purposes. Lastly, it is to be noted that, Section 23(1)(d) of the LRA makes provision for the extension of a collective agreement to non-parties.

The Minister of Employment and Labour, in terms of the BCEA (as mentioned above), must make – and has made – a number of sectoral determinations (e.g. hours of work, overtime, payment for overtime, night work, standby, meal intervals, rest periods, payment for work on Sundays and public holidays) to make provision for unique circumstances in the following industries: contract cleaning sector, civil engineering sector, learnerships, private security sector, domestic workers, wholesale and retail sector, and children in the performing arts. There are also sectoral determinations for the taxi sector, forestry sector, farm work sector, and hospitality sector, plus the ministerial determination for the small business sector (for businesses with fewer than ten employees). Many of these determinations contain leave provisions identical or a little better than those in the BCEA.

The leave provisions in the BCEA and sectoral determinations are minimum standards provided, but these standards may be improved upon through two different modes. The first is that an employer can decide to increase the leave days that they want to give their employees. The condition is that the leave cannot be less than prescribed by the BCEA or the sectoral determinations. Many employers have also done this, i.e. leave policies of different employers indicate that they are giving between 15 and 30 working days' leave to employees. It is also common practice for employers to use leave as a retention and reward strategy, in as far as they provide more leave to employees who have working for them longer and, as a reward, they increase or provide a set number of days with a long service award. For example, the Determination and Directive on Leave of Absence Service offers employees 30 days of annual leave after ten years of service (up from 22 days of annual leave).

The second mode of determining leave is the collective bargaining process, usually in statutory forums, referred to as bargaining councils. Information and data on leave provisions in bargaining council agreements is difficult to obtain, as there does not appear to be an accessible or central database housing the agreements of all the bargaining councils in South Africa. Bargaining council agreements are also not necessarily a reliable indicator of employer provision, because bargaining councils do not exist for all industrial sectors. Even in those sectors that do have bargaining councils, not all employers in the industry are necessarily members of the bargaining council or are covered by the scope of the collective agreements specific to their environment.

1. Current leave and other employment-related policies to support parents

a. Maternity leave (responsibility of the Department of Labour)

Length of leave (before and after birth)

- Four consecutive months: leave may start at any time from four weeks before the expected date of birth, unless otherwise agreed; or on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health, or that of their unborn child. The birth mother may only return to work within six weeks after birth; this period can only be reduced if a medical practitioner or midwife certifies that the employee may return to work earlier.

Payment and funding

- Statutory Maternity leave is unpaid, but there are benefits that can be claimed from the Unemployment Insurance Fund (UIF)³. If an employee has been contributing to the UIF, the employee will be able to claim benefits for a maximum period of 17.32 weeks or four months (section 24 of the BCEA). This claim is subject to the number of credit days an employee has. If an employee has worked and contributed for four continuous years, the employee will be entitled to the full amount of credit days for payment over the whole period of Maternity leave.
- The Unemployment Insurance Fund (UIF) benefits are payable at a flat rate of 66 per cent of monthly earnings to a female contributor for 'confinement' (i.e. being on Maternity leave) and the period after birth of a child. As of June 2021, the benefit is capped to a maximum benefit of ZAR17,712 [€858.66]⁴ a month. Maternity benefits are paid for a maximum

³UIF payments are based on the number of 'credit days' an employee has accumulated in four years. An employee must work six days to receive one credit day at the UIF. This means that for every six days the employee works, they can claim one day's pay from the UIF. The employee would need to accumulate 238 credit days to receive the full benefit.

⁴ Conversion of currency undertaken for 06 June 2023, using: <https://sdw.ecb.europa.eu/curConverter.do>.

of 17.32 weeks (121 days). If an employee earns more than the threshold and the employer does not pay while the employee is on Maternity leave, UIF will pay the maximum earnings ceiling of ZAR17,712 [€858.66] or ZAR212,544 [€10,303.86] per annum. If the employer pays less than the regular earnings per month, the UIF will top the payment up to the maximum earnings ceiling. Income tax is not payable on benefits received from the UIF.

- Employers are not legally obliged to pay employees, but it is common practice amongst employers to provide some form of maternity benefits to employees while on Maternity leave. These benefits vary from employer to employer. Employers may expect, by mutual agreement, the employee to sign a service agreement when they receive any maternity benefits.
- Data from 2021⁵ indicated that while 60 per cent of participating employees were provided with fully paid Maternity leave, 24 per cent did not receive a salary creating a financial burden during a time when these funds are critically needed.
- If an employee receives maternity benefits in terms of a collective agreement, contract of employment or any other legal means, the UIF benefit will only cover the shortfall between the benefit received and their normal monthly salary. This is done so that the total amount the employee will receive from the UIF and other sources cannot exceed their normal monthly salary. Employees must apply for Maternity leave benefits at a labour centre at least eight weeks before the expected date of birth (section 25 of the Unemployment Insurance Act).
- Compulsory contributions to the UIF are made by employers and employees on a monthly basis, and each contributes one percent of the employee's earnings, this respective monthly UIF contribution per employee/employer is limited to ZAR177.12 [€8.59] per month.
- The main exception concerns employees working in the national and provincial government. Public service employees are entitled to four months of Maternity leave (under the terms of the August 2021 determination: 'Leave of Absence in the Public Service'). Although this does not explicitly state that leave is fully paid, it can be assumed to be so because contract workers are entitled to fully paid Maternity leave under this Determination.
- Companies still pay the pension and medical contributions for employees on Maternity leave but this could alter by agreement between the employee and employer.

Flexibility in use

- Employees who have miscarriages or give birth to stillborn babies in their third trimester are entitled to six weeks' leave afterwards, regardless of whether or not they have already gone on Maternity leave (section 25 (4) of the BCEA).
- There is no distinction between live and stillbirths in the granting of maternity benefits if the pregnancy has lasted at least 24 weeks.

⁵ Old Mutual (2022, May 12). *Why employers and HR need to review their maternity leave policies.* <https://www.oldmutual.co.za/corporate/resource-hub/all-articles/why-employers-and-hr-need-to-review-their-maternity-leave-policies/>

Eligibility (e.g., related to employment or family circumstances)

- Maternity leave is not sex specific. According to section 25 of the BCEA Act⁶ which governs Maternity leave in South Africa: 1) 'an employee is entitled to Maternity leave' and 2) 'an employee may commence Maternity leave'. However, this Act infers that an 'employee' must be capable of conceiving and giving birth.
- The Unemployment Insurance Act (UIA) and Unemployment Insurance Contributions Act apply to all employers and employees, except for: employees working fewer than 24 hours per month for an employer; learners (including students and those on apprenticeships); public servants; and foreigners working on contract (who have a work permit and contribute to the fund); employees who get a monthly state pension; and workers who only earn a commission. Non-residents and undocumented migrants will also not qualify as they would not be contributing to the fund.
- The BCEA regulating Maternity leave specifically excludes employees of the National Defence Force, National Intelligence Agency, or SA Secret Service, workers who work fewer than 24 hours per month and unpaid volunteers working for an organisation with a charitable purpose.
- The UIA excludes public servants. Maternity leave and maternity pay for these employees are regulated by the determinations reached in the public service bargaining council (see 'additional note' below).
- Independent contractors and self-employed women are not eligible for Maternity leave or maternity pay.
- Entitlement to maternity pay is determined by an employee's status as a contributor and is not affected by whether her partner is working or not.
- There are differences in terms of eligibility for Maternity leave (BCEA) and maternity payments (UIA); however, both acts require an employee to be working for more than 24 hours per month, to receive Maternity leave and maternity pay.

Variation in leave due to child or family reasons (e.g., multiple or premature births; poor health or disability of child or mother; lone parent) or delegation of leave to a person other than the mother

- *Premature birth*: if the baby is born prematurely, maternity payments will not be affected and will continue to be paid in the normal way. If an employee's baby is born before maternity pay has started, the employer must be informed of the birth as soon as possible.
- *Pregnancy-related sickness*: if an employee is sick during their pregnancy before they start their Maternity leave, the normal rules relating to notification procedures, medical certification, sick leave, and sick pay

⁶ Nowhere in the Act is 'an employee' defined in gendered terms; the act is silent on identifying an employee as female. The result of this is that, in the case of *Mia v. State Information Technology Agency (Pty) Ltd*, the Labour Court in Durban found that the failure of an employer to grant Maternity leave to a male employee in a duly registered civil union following the birth of a child through a surrogacy agreement, constituted unfair discrimination as the Judge ruled in the best interests of the child. The employer refused the male employee four months' paid Maternity leave in line with company policy, on the grounds that he was not female and that their policy does not govern birth by surrogacy – see Van Bever Donker, K. (2015, December 1) *Case Law: Maternity Leave for Men. Labour law for Managers: Practical Handbook*, pp. C 35/001 - C 35/010.

entitlements will apply. Where the employee is absent from work due to a pregnancy-related illness at any time after the start of the fourth week before her child is due, the employee may request to start their Maternity leave immediately, as per the provision in section 25 (b) of the Code of Good Practice.

- *Sick leave*: Maternity leave is not treated as absence due to illness. Employees are not entitled to receive sick pay.

Additional note (e.g., if leave payments are often supplemented by collective agreements; employer exclusions or rights to postpone)

- Employees in the public service are entitled to four months' paid Maternity leave and can apply for an additional 184 calendar days of unpaid leave. Since January 2013, an employee falling under the public service bargaining council is entitled to up to eight working days of pre-natal leave per pregnancy, in order to attend medical examinations⁷.
- A 2012 survey of wage agreements collected from trade unions, bargaining councils, and sectoral determinations – covering a diverse range of industries and over 900 bargaining units – showed that employers offered Maternity leave ranging from the statutory minimum of four months in sectoral determinations to 5.1 months in bargaining council agreements.
- The percentage of employers offering maternity pay (as a percentage of basic wage) ranged from 20 per cent in sectoral determinations to 47.7 per cent in bilateral agreements⁸.
- Employees are entitled to return to the specific post (or comparable post) that they left before going on Maternity leave. It would be considered discriminatory to dismiss an employee for any reason related to pregnancy, a right that is protected by the automatically unfair dismissal provisions of the Labour Relations Act and the unfair discrimination on a listed ground (pregnancy) provision of the Employment Equity Act.

b. Paternity leave

- No statutory entitlement.

⁷ Department of Public Service and Administration (2021) *Determination and Directive on Leave of Absence in the Public Service, August 2021*. Pretoria: Government Printer.

⁸ The last published report was in 2013, still only reflecting the 2012 survey. See also 'flexible working' (Section 1e) for the code of good practice titled *Protection of Employees during Pregnancy and After the Birth of a Child* (Government Gazette, 1998) and Easley, T. (Ed.). (2013, March) *Bargaining Monitor*, Vol.27, 179, from The Labour Research Service. Available at: [http://www.lrs.org.za/docs/LRS_BM_Strategic per cent20Bargaining per cent20in per cent202013.pdf](http://www.lrs.org.za/docs/LRS_BM_Strategic_per cent20Bargaining_per cent20in_per cent202013.pdf)

c. Parental leave

Length of leave

- Ten calendar days for employees who are parents - irrespective of sex - commencing on the day that the child is born (see Section 1b for the provision of leave in Section 25A of the Labour Laws Amendment Act, No. 10 of 2018).

Payment and funding

- Sixty-six per cent of earnings of the beneficiary at the date of application.
- Funding is provided for parental benefits from the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

Eligibility

- The individual has to have been employed for a minimum of 13 weeks.

d. Childcare leave or career breaks

- No statutory entitlement.

e. Other types of leave and flexible working

Adoption leave and pay

- Section 3 of the Labour Laws Amendment Act provides for adoption leave to be added to the BCEA, section 25B, and allows for an eligible employee who is adopting a child to take time off when a child is placed with them for adoption. The provisions apply to married couples, couples in a civil partnership, unmarried couples (same and opposite sex), and single people who adopt. This applies to placements for children younger than two years of age. Adoption leave is extended to an individual or to one member of an adopting couple.
- An eligible employee is entitled to adoption leave of ten weeks consecutively.
- If the employee is a foster parent, who is also approved as a prospective adopter, and a child is placed with the employee in a 'foster to adopt' situation, they will have the same entitlement to adoption leave and pay.
- If an adoption order is made in respect of two adoptive parents, only one may apply for adoption leave and the other for Parental leave. The selection of choice may be exercised at the option of the adoptive parents.
- An employee who is the primary carer is entitled to paid leave associated with the adoption of a child, and the payment of parental benefits are

determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001). Section 8(c) of the Labour Laws Amendment Act provides, in subsection (cB), for adoptive benefits to be paid at a rate of 66 per cent of the beneficiary's earnings at the date of application. In order to qualify, an employee has to have been employed for at least 13 weeks.

Commissioning Parental leave

- Section 3 of the Labour Laws Amendment Act provides for adding section 25C to the BCEA and provides a commissioning parent in a surrogate motherhood agreement with at least ten weeks consecutive commissioning Parental leave, or ten consecutive days Parental leave, as described in section 25A of the BCEA.
- Section 25C(6) states that if a surrogate motherhood agreement has two commissioning parents, they can choose: One of the commissioning parents is entitled to commissioning Parental leave of ten consecutive weeks, and the other commissioning parent is entitled to normal Parental leave of ten consecutive days referred to in section 25A.
- An employee who is commissioning parent (the primary carer) is entitled to leave claims associated with the adoption of a child and the payment of commissioning parental benefits, and the other parent is entitled to leave claims associated with Parental leave, as determined by the minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001). In order to qualify, an employee has to have been employed for at least 13 weeks.
- Section 8(c) of the Labour Laws Amendment Act provides, in subsection (cC), for commissioning parental benefits to be paid at a rate of 66 per cent of the beneficiary's earnings at the date of application.

Adoption and commissioning Parental leave for public service employees

- Employees in the public service are entitled to leave of 45 working days when adopting a child under the age of two, due to the August 2021 determination regulating leave in the public service. Section 4 of the determination now also includes surrogacy leave and adoptive leave (Department of Public Service and Administration). Although this determination does not explicitly state that adoption leave is fully paid, it can be assumed to be so because contract workers are entitled to fully paid adoption leave under this determination. These employees are permitted to extend this leave by 184 calendar days of unpaid leave.
- Surrogacy leave for public servants has been divided into two categories:
 - for the commissioning parent who, from 8 June 2018, may take four consecutive calendar months' paid leave, commencing from the date of the birth.
 - for the surrogate mother, who will be entitled to six consecutive weeks' paid Maternity leave.

Time off for the care of dependants

- Family Responsibility leave can be used if an employee's child or adopted child is sick (younger than 18 years, or any age if the child is differently abled). Family responsibility leave is three days paid leave per year, which full-time employees are entitled to. An employee must have been employed for longer than four months for the same employer and work at least four days per week to qualify for this leave.
- In the private sector, an employee is entitled to family responsibility leave when the employee's child is sick; or in the event of the death of the employee's spouse or life partner, or the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild, or sibling. This leave is fully paid by the employer and is available for a maximum period of three days in a 12-month period (five days for domestic workers). This leave is an individual entitlement that cannot be shared by spouses, if one spouse chooses not to use their leave.
- The employer is entitled to require proof such as a medical or death certificate.
- Should the employee require more than three days, the employee will be required to take annual leave for the exceeding days.
- Evidence from a 2012 survey found that employers offered improvements on the three-day statutory minimum period of family responsibility leave, ranging from 3.8 days to 4.3 days⁹.
- In the public sector, according to the public service determination ¹⁰, employees in the public service are permitted to utilise family responsibility leave as follows. With effect from 1 January 2013, employees are entitled to the following family responsibility benefits:
 - five working days' family responsibility leave per annual leave cycle to be used if the employee's spouse or life partner gives birth to a child; or the employee's child, spouse or life partner is sick;
 - five working days leave' per annual leave cycle to be used if the employee's child, spouse or life partner or an employee's immediate family member dies.
- With effect from 20 May 2015, an employee who has any children with severe special needs shall be granted five working days' family responsibility leave per calendar year.
 - Severe special needs are defined as a child who has a mental, emotional, or physical disability, certified by a medical practitioner, which requires health and related services of a type or amount beyond that required by children generally. For the purposes of this provision, 'child' means the employee's offspring of any age. An application for family responsibility leave should be supported by reasonable proof to demonstrate the severe special needs of the employee's child.
- Total family responsibility leave cannot exceed five days in an annual leave cycle (a period of 12 months commencing from the first day of employment or from the end of the previous leave cycle). The determination does not stipulate that this leave is paid, but it can be assumed to be so because it specifically refers to the fact that if employees have used their family

⁹ Easley, T. (ed.). (2013) *Bargaining Monitor*, Vol. 27, 179, from the Labour Research Service. Available at: [http://www.lrs.org.za/docs/LRS_BM_Strategic per cent20Bargaining per cent20in per cent202013.pdf](http://www.lrs.org.za/docs/LRS_BM_Strategic_per cent20Bargaining_per cent20in_per cent202013.pdf)

¹⁰ Department of Public Service and Administration, June 2021

responsibility leave, they can apply for available annual leave or apply for a further 184 calendar days, to be utilised as unpaid leave.

- By virtue of a ministerial determination regulating conditions of employment in small businesses, employers who employ fewer than ten employees are permitted to reduce the amount of annual leave granted to an employee by the amount of family responsibility leave granted to that employee.

Specific provision for (breast)feeding

- Section 26(1) of the BCEA prohibits employers from requiring or allowing a pregnant or breastfeeding employee to perform work that is hazardous to her health or the health of her child. This means employers must assess and control risks to the health of pregnant or breastfeeding employees and that of the foetus or child. The code also recommends that arrangements be made for employees who are breastfeeding to have breaks of 30 minutes twice a day to breastfeed or express milk, for the first six months of a child's life.

Flexible working

- No general statutory entitlement, though some companies may provide such leave as part of their attraction and retention strategy especially during and post COVID-19.
- Codes of good practice, whilst not constituting binding law, the Code must be considered when applying or interpreting any employment law. The code of good practice regarding the protection of employees during and after pregnancy¹¹ provides that employers must consider granting rest periods to employees who experience tiredness associated with pregnancy, and should also consider that tiredness associated with pregnancy may affect an employee's ability to work overtime. It further recommends that employers identify and assess any workplace hazards which may impact the pregnant mother and/or foetus, and consider appropriate action. The code of good practice titled 'Integration of Employment Equity into Human Resource Policies and Practices' adds that an employer should provide reasonable accommodation for pregnant women and parents with young children, including health and safety adjustments and ante-natal care leave.
- The code of good practice regarding the arrangement of working time adds that arrangements should be considered to accommodate the special needs of workers, such as pregnant and breastfeeding workers, and workers with family responsibilities (s26 BCEA).
- The code of good practice titled 'Integration of Employment Equity into Human Resource Policies and Practices' requires employers to endeavour to provide 'an accessible, supportive and flexible environment for employees with family responsibilities.' This is specified to include 'considering flexible working hours and granting sufficient family responsibility leave for both parents.' In addition, the code of good practice for working time arrangement states that the design of shift rosters must be sensitive to their impact on employees and their families and should take into consideration

¹¹ Government Gazette (1998) *Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child*. Pretoria: Government Publishers.

the childcare needs of the employees. The code of good practice titled 'Protection of Employees during Pregnancy and After the Birth of a Child' states that arrangements should be made for pregnant and breastfeeding employees to be able to attend ante-natal and post-natal clinics during pregnancy, as well as after the birth of the child.

2. Relationship between leave policy and early childhood education and care policy

- Maternity leave benefits are paid for a maximum duration of 17.32 weeks (121 days), paid at 38 per cent to 66 per cent of earnings depending on the level of income. There is no entitlement to Early Childhood Education. The National Integrated Early Childhood Development Policy (2015), covers the period from conception until the year before children enter formal school or, in the case of children with developmental difficulties and disabilities, until the year before the calendar year they turn seven, which marks the age of compulsory schooling or special education. In South Africa in 2022, 1.6 million children (72 per cent) under the age of six were enrolled to attend an Early Learning Programme meant to prepare them for school. Concerningly, this figure was closer to 2 million before the Covid19 pandemic. The decline shows that parents are slow to send their children back to pre-school, possibly due to financial strain (many lost their jobs), or because many parents don't realise the importance of early education for their child's future success¹².
- South Africa is not included in the comparative tables on ECEC enrolment produced for the OECD Family Database.

3. Changes in policy since April 2022 (including proposals currently under discussion)

- No changes reported.

¹² Grow Educare Centres (2022, June) *The alarming state of early childhood development in South Africa*. Available at: <https://www.growecd.org.za/2022/06/03/the-alarming-state-of-early-childhood-development-in-south-africa/>

4. Uptake of leave

a. Maternity leave

- In the Quarterly Labour Force Survey 2021¹³, quarter four (p. 6) indicates that there are 15,938,000 million people employed in South Africa. Of these (p. 63), 13,356,000 are entitled to Maternity or Paternity leave: equating to 83.8 per cent of employees that were entitled to some form of Maternity or Parental leave for that year (Statistics South Africa, 2022). However, there are no available figures for the take-up of Maternity leave.

b. Paternity leave

- No statutory entitlement.

c. Parental leave

- There is no information available.

¹³ Statistics South Africa (2022) *Quarterly Labour Force Survey*, Quarter 4: 2022. Pretoria: Statistics South Africa.