

# South Africa<sup>1</sup>

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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.

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

**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 contexts 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 i.e.: The National Defence Force, National Intelligence Agency or SA Secret Service and workers who work less than 24 hours in a month. There are two other mechanisms that can have an influence on leave determinations, and those are: A Collective Agreement (in terms of s213 of the SA Labour Relations Act (LRA), (Act 66 of 1995 as amended.) and Sectoral Determinations.

### Collective Agreements

A collective agreement is a written agreement concerning terms and conditions of employment (or any other matter of mutual interest) concluded by one or more registered trade unions, on the one hand, and, on the other hand, one or more employers or one or more registered employers' organisations - s213 of the LRA.

### Sectoral Determinations

A sectoral determination is not an agreement, it is a determination made by the Minister of Labour in terms of Chapter 8 of the BCEA - and, before making a sectoral determination for employees in an area or sector, the Minister of 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), they have different purposes. Lastly, it is to be noted that neither the LRA nor the BCEA make provision for the extension of a Collective Agreement to non-parties by means of the promulgation of a Sectoral Determination in terms of the BCEA.

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The Minister of Labour in terms of the BCEA (as mentioned above) has to make, and has made, a number of sectoral determinations 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, Children in the Performance Arts – no mentioning of leave provisions; the determination only refers to working hours. Also, the Sectoral Determination for the Taxi Sector, Forestry Sector, Farm Worker Sector, Hospitality Sector, and the Ministerial Determination for Small Business Sector (for businesses with less 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 employers are giving between 15 and 30 working days leave to employees. It is also practice that employers use leave as a retention and reward strategy in as far as they provide more leave to employees working longer for the employer and as an award they increase or provide a set number of days with a long service award.

The second mode of determining leave is the collective bargaining process, usually in statutory forums called Bargaining Councils. Information/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 the industrial sectors in the country. 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.

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

### *Length of leave (before and after birth)*

- Employees have a statutory entitlement to four consecutive months of unpaid Maternity leave.
- The four months Maternity leave is compulsory and can only be less if a doctor certifies that an employee may return earlier.
- Maternity Leave is not gender specific. According to s25 of the BCEA Act<sup>2</sup> which governs Maternity leave in South Africa the mention concerns: 1) “An

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<sup>2</sup> Nowhere in the Act is “an employee” defined in gender 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, South Africa 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. The employer refused 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.

employee is entitled to ...” and 2) “An employee may commence Maternity leave ...”.

- An employee may commence Maternity leave 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 her unborn child.

### *Payment and funding*

- Statutory Maternity leave is unpaid but there are benefits that can be claimed from the Unemployment Insurance Fund (UIF)<sup>3</sup>. 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 (s24 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 scale of benefits contained within Government Gazette No. 588 (Dept of Labour, 2017). The value of the benefit pay-out by the Fund has been amended. The changes in the amounts are an increase in the per annum rates, from ZAR178.464 [€11,400.22]<sup>4</sup> to UAR212.539 [€13,576.92] and an increase in the monthly amount to ZAR17.712 [€1,131.44] and an increased weekly amount of ZAR 4.087 [€261.08]. Income tax is not payable on benefits received from 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 the employee to sign a service agreement when they receive any maternity benefits.
- 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 make up the shortfall between the benefit received and the normal monthly salary. This is done so that the total amount the employee will receive from the UIF and other sources cannot exceed the normal monthly salary. Employees must apply for Maternity leave benefits at a Labour Centre at least 8 weeks before the expected date of birth (s25 of the Unemployment Insurance Act).
- Compulsory contributions to the UIF are made by employers and employees on a monthly basis and each contribute one per cent of the employee’s earnings, up to a maximum combined contribution is ZAR148.72 [€9.50] per month.
- The main exception is employees in National and Provincial Government. Public Service employees are entitled to four months Maternity leave under the terms of a July 2009 Determination on 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 in this Determination.

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<sup>3</sup> UIF 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, s/he can claim one day’s pay from the UIF. The employee would need to accumulate 238 credit days to receive the full benefit.

<sup>4</sup> Conversion of currency undertaken on 13 June 2018, using:  
<http://finance.yahoo.com/currency-converter>

- Companies still pay the pension and medical contribution for employees on Maternity leave.

*Flexibility in use*

- Women who have miscarriages or give birth to stillborn babies in their third trimester are entitled to six weeks' leave afterwards, regardless of whether they have already gone on Maternity leave (s25 (4) of the BCEA).
- There is no distinction between live and still births in the granting of maternity benefits if the pregnancy has lasted at least 24 weeks.

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

- The Unemployment Insurance Act (UIA) and Unemployment Insurance Contributions Act apply to all employers and employees, except for employees working less than 24 hours a month for an employer, learners (includes 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 not qualify as they would not be contributing to the Fund.
- The BCEA regulating Maternity leave specifically excludes employees of the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) and the South African Secret Service (SASS).
- The UIA excludes Public Servants. The regulation of Maternity leave and maternity pay for these employees is 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). But both Acts require an employee to be working for more than 24 hours a 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 person other than the mother*

- *Premature Birth*: if the baby is born prematurely but after maternity pay has started, 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, she must, inform her employer of the birth as soon as possible.
- *Pregnancy related sickness*: if an employee is sick during her pregnancy before she starts her Maternity leave, the normal rules relating to notification procedures, medical certification, sick leave and sick pay entitlements, will apply. Where the employee is absent from work due to a pregnancy related illness at any time after the start of the 4th week before her child is due, employers may reserve their right to require the employee to start her maternity leave immediately. All other sickness will be dealt with under the employer's attendance and sickness management policies.

- *Sick Leave*: Maternity leave is not treated as absence due to illness. Employees are not entitled to receive sick pay, i.e. employees cannot be classed as 'off sick' during Maternity leave.

*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 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 are entitled up to eight working days pre-natal leave per pregnancy to attend medical examinations. The Determination does not specifically state that these absences are paid but it could be interpreted to be so given the wording of the Determination in general<sup>5</sup>.
- 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 agreement.
- 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 agreement<sup>6</sup>.
- Employees are entitled to return to their specific post or comparable post they left before going on Maternity leave. It would be considered discriminatory to dismiss a woman for any reason related to her pregnancy, a right which is protected by the unfair dismissal provisions of the Labour Relations Act.

## **b. Paternity leave**

No statutory entitlement, but fathers who wish to take leave at the time of the birth of their child can use their Family responsibility leave (see section 1e); this leave is available to both mothers and fathers and nothing in the legislation restricts this leave from being taken by both parents at the same time. Alternatively, a father can use this leave while his wife is on Maternity leave.

## **c. Parental leave**

No statutory entitlement (though some companies may provide such leave)

## **d. Childcare leave or career breaks**

No statutory entitlement (though some companies may provide such leave)

## **e. Other employment-related measures**

*Adoption leave and pay*

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<sup>5</sup> Department of Public Service and Administration. (June 2015). Determination and Directive on Leave of Absence in the Public Service, June 2015 (pg31). Pretoria: Government Printer.

<sup>6</sup> Last published report was in 2013 still only reflecting the 2012 survey. See also 'flexible working' (section 1e) for the Code of Good Practice on the 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, No.179, from The Labour Research Service. Available at: [http://www.lrs.org.za/docs/LRS\\_BM\\_Strategic%20Bargaining%20in%202013.pdf](http://www.lrs.org.za/docs/LRS_BM_Strategic%20Bargaining%20in%202013.pdf)

- There is no statutory leave for the adoption of a child. There is, however, a right to claim unemployment insurance benefits for time off work for adoption purposes. Only one parent can make application for adoption benefits and the child adopted must be under two years of age. The failure to provide statutory adoption leave means that if an employer refuses to grant an employee adoption leave it effectively nullifies the provision of adoption payment from the UIF.
- Employees in the Public Service are entitled to leave of 45 working days when adopting a child under the age of two years due to the July 2015 Determination regulating leave in the Public Service. Section 4 of the Determination now also includes Surrogacy leave on the same terms as Adoptive leave. (Department of Public Service and Administration, June 2015). Although this determination does not explicitly state that this leave is fully paid, it can be assumed to be so because contract workers are entitled to fully paid adoption leave in this Determination. These employees are permitted to extend this leave by 184 calendar days of unpaid leave.

#### *Time off for the care of dependants*

- An employee in the private sector is entitled to Family responsibility leave when the employee's child is born (not including the birth mother); 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, 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). An employee must have been employed for longer than four months and work at least four days per week to qualify for this leave. This leave is an individual entitlement that cannot be shared by spouses, if one spouse chooses not to use his/her leave.
- 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 days<sup>7</sup>
- According to the Public Service Determination<sup>8</sup> employees in the Public Service are permitted to utilise Family responsibility leave as follows:
- Employees are entitled to the following Family responsibility benefits:
  - five working days Family responsibility leave per annual leave cycle for utilisation 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.
- An employee who has a child(ren) 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 son or daughter of any age. An application for Family responsibility leave should be supported by

<sup>7</sup> Eisley, T. (ed.). (2013, March) Bargaining Monitor, Vol.27, No.179, from The Labour Research Service. Available at:

[http://www.lrs.org.za/docs/LRS\\_BM\\_Strategic%20Bargaining%20in%202013.pdf](http://www.lrs.org.za/docs/LRS_BM_Strategic%20Bargaining%20in%202013.pdf)

<sup>8</sup> Department of Public Service and Administration, June 2015.

- reasonable proof to demonstrate the severe special needs of the employee's child.
- Total Family responsibility leave cannot exceed five days. The Determination does not stipulate that this leave is paid, but it can be assumed to be so because the Determination specifically refers to the fact that if employees have used their Family responsibility leave they can apply for available annual leave or apply for a further 184 calendar days to be utilised as unpaid leave. This is subject to the approval of the Head of Department.
  - 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.

### *Flexible working*

- No general statutory entitlement.
- Codes of Good Practice are guidelines for employers and do not have the status of legislation. The Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child<sup>9</sup> 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 workplace hazards to the pregnant mother and/or to the foetus and consider appropriate action. The Code of Good Practice on the 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 on Arrangement of Working Time adds that arrangements should be considered to accommodate the special needs of workers such as pregnant and breast-feeding workers and workers with family responsibilities.
- The Code of Good Practice on the 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 on Arrangement of Working Time states that the design of shift rosters must be sensitive to the impact of these rosters on employees and their families and should take into consideration the childcare needs of the employees. Codes of Good Practice are guidelines for employers and do not have the status of legislation. The Code of Good Practice on the 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 and after the birth of the child and recommends that arrangements be made for employees who are breastfeeding to have breaks of 30 minutes twice a day to breast feed, or express milk for the first six months of a child's life.

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<sup>9</sup> Government Gazette (1998) Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child. Pretoria: Government Publishers.

*Specific provision for (breast-)feeding*

- None.

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

The maximum period of paid post-natal leave available is four months, paid at 38 per cent to 66 per cent of earnings. There is no entitlement to early childhood education and care (ECEC) and the compulsory school age is seven years. The 2015 General Household Survey (Statistics South Africa, 2015)<sup>10</sup> indicates that approximately 33 per cent of children aged between birth and four years attended day-care or educational facilities outside their homes.

## **3. Changes in policy since April 2017 (including proposals currently under discussion)**

According to the South Africa media, history was made in the South African Parliament on 28 November 2017, when a private member's bill was passed for the first time in the National Assembly. The Labour Laws Amendment Bill, proposed by ACDP MP Cheryllyn Dudley, aims to give fathers the opportunity to take Paternity leave. The purpose of this Bill is to provide for Parental leave, adoption leave and commissioning Parental leave as well as for providing payment of parental benefits from the Unemployment Insurance Fund. The bill is referred to the National Council of Provinces (NCOP) for approval; if approved, it goes to the President, who will sign it into law.

The Bill makes provision for the following:

### *Parental leave*

Section 25A of the amendment act suggests that a section be inserted in the BCEA of 1997. This section will provide an employee, who is a parent of a child, to be entitled to at least ten consecutive days Parental leave. This section will be for an employee's child that is born or for the adoption of a child and it includes in subsection (5) for payment of parental benefits. Section 26A(1)(a) provides the right to parental benefits and states that the contributor to the UIF must be registered as the father of the child in terms of the Births and Deaths Registration Act to receive the benefit.

### *Adoption leave*

Section 25B of the amendment act provide for at least ten consecutive weeks of leave for an employee who is adopting a child below the age of two. Subsection 5 describes the UIF payment set by the Minister. Section 26A(1)(b) provides the right to parental benefits for adoption leave for a child below the age of two.

### *Commissioning Parental leave*

Subsection 25C of the amendment act provides for at least ten consecutive weeks of leave for an employee who is a commissioning parent in a surrogate motherhood agreement. Again, subsection 5 describes the UIF payments set by the Minister. Section 26A(1)(c) provides the right to parental benefits for a parent of a child who has been born because of a surrogate motherhood agreement. The Unemployment

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<sup>10</sup> Statistics South Africa (2015). *General Household Survey*. Pretoria: Stassa.

Insurance Act of 2001 will also be amended to include payments to adoptive parents as envisaged by the inclusion of parental and commissioning parental benefits.

## 4. Take-up of leave

### a. Maternity leave

The Quarterly Labour Force Survey 2017<sup>11</sup>, Quarter four indicates that there are 22,051,000 people employed in South Africa. Of these 13,778,000 have access to Maternity or Paternity leave which equates to 62.45 per cent of employees that were entitled to some form of Maternity or Paternity leave in 2017 (Statistics South Africa, 2017). However, there are no available figures for the take up of Maternity leave.

### b. Paternity leave

There is no statutory leave entitlement. There is no information on the take-up of Family responsibility leave used for this purpose or for the take-up of Paternity leave provided for in collective agreements.

### c. Parental leave

There is no statutory leave entitlement. There is no information on the take-up of Parental leave provided for in collective agreements.

## 5. Research and publications on leave and other employment-related policies since April 2016

Please be aware that this is not intended to be a comprehensive list of all publications or research in this area for this country. If you are aware of a publication or research that could be listed in this section, please contact the country note author(s) so that they can include it for the following year.

### a. General overview

There is a shortage of research examining statutory leave entitlements in South Africa, and little information on employee take-up of existing leave entitlements.

### b. Selected recent publications

Nhlapo, Z. (2018) 'New Parental Leave Bill: What you need to know', *Huffpost* (29 November 2017) Available at: [https://www.huffingtonpost.co.za/2017/11/29/new-parental-leave-for-dads-what-you-need-to-know\\_a\\_23291248/](https://www.huffingtonpost.co.za/2017/11/29/new-parental-leave-for-dads-what-you-need-to-know_a_23291248/)

Pienaar, H. and Kok, R. (2017) 'Paternity leave and the archaic gender roles entrenched in employment law', in: A. Bosch (ed.), *South African Board for People Practices Woman's Report 2017*. Rosebank, South Africa: SABPP, pp.18 – 25

Swanepoel, S. (2017) 'Yes! South African dads are getting paid paternity leave!' *Parent24* (.29 November 2017). Available at : [http://www.parent24.com/Pregnant/Getting\\_Ready/yes-south-african-dads-are-getting-paid-paternity-leave-20171129](http://www.parent24.com/Pregnant/Getting_Ready/yes-south-african-dads-are-getting-paid-paternity-leave-20171129)

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<sup>11</sup> Statistics South Africa. (2017). *Quarterly Labour Force Survey*, Quarter 4: 2017

**c. Ongoing research**

None.