

South Africa¹

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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 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: the National Defence Force, National Intelligence Agency, or SA Secret Service, and workers who work fewer than 24 hours per month. 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.

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 employers or one or more registered employers' organisations – section 213 of the LRA.

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

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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) – as such, 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.

The Minister of Employment and Labour, in terms of the BCEA (as mentioned above), must 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, and children in the performing arts. This does not include leave provisions: the determination only refers to working hours. 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 worked for them longer and, as a reward, 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, 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)

- In South Africa, employees have a statutory entitlement to four consecutive months of unpaid Maternity leave.
- The four months' Maternity leave is compulsory for the birth mother, and can only be reduced if a doctor certifies that the employee may return to work earlier.
- Maternity leave is not gender specific. According to section 25 of the BCEA Act² which governs Maternity leave in South Africa: 1) 'an employee is entitled to Maternity leave' 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).³

² 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. 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.

³ 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, they can claim one day's pay from the UIF. The employee would need to accumulate 238 credit days to receive the full benefit.

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 earnings to a female contributor for "confinement" (i.e. being on Maternity leave) and the period after birth of a child. The benefit is capped to a maximum benefit of R14,872 [€741.04]⁴ a month. Maternity benefits are paid for a maximum of 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 of R14,872 [€741.04]. If the employer pays less than the regular earnings per month, the UIF will top the payment up to the maximum of R14,872 [€741.04]. 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 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 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 the 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 per cent of the employee's earnings, up to a maximum combined contribution of ZAR148.72 [€7.41] per month.
- The main exception concerns employees working in national and provincial government. Public service employees are entitled to four months of Maternity leave (under the terms of the June 2018 determination: 'Leave of Absence in the Public Service'). Although this does not explicitly state that leave is fully paid, it can be

⁴ Conversion of currency undertaken for 31 July 2020, using:
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-zar.en.html

assumed to be so, because contract workers are entitled to fully paid Maternity leave under this determination.

- 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 (section 25 (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 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 South African National Defence Force (SANDF), the National Intelligence Agency (NIA), and the South African Secret Service (SASS).
- 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, in order 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 fourth week before her child is due, employers may reserve their right to require the employee to start her Maternity leave immediately. All other episodes of 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.

(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 is entitled to up to eight working days of pre-natal leave per pregnancy, in order 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.⁵
- 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 agreements.⁶

⁵ Department of Public Service and Administration (2018) *Determination and Directive on Leave of Absence in the Public Service, June 2018*. Pretoria: Government Printer.

⁶ The last published report was in 2013, still only reflecting the 2012 survey. See also 'flexible working' (1e) for the code of good practice titled *Protection of Employees during Pregnancy and After the Birth of a Child* (Government Gazette, 1998) and Eisley, T. (Ed.). (2013, March) *Bargaining Monitor*, Vol.27, 179, from The Labour Research Service. Available at:

- 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 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

- Paternity leave in South Africa is described in section 3 of the Labour Laws Amendment Act, No. 10 of 2018 promulgated on 27 November 2018. It is important to note that the term 'Paternity leave' is not used in the Labour Amendment Act, but, according to our definitions, the measure is to be classified as Paternity leave rather than Parental leave.
- Section 25A provides for ten consecutive days of unpaid leave for an employee, when the employee's child is born.
- This section also includes when an adoption order is granted or when a child is placed in the care of a prospective adoptive parent.
- In section 25A (5), payment is provided for parental benefits from the Unemployment Insurance Act, 2001 (Act No. 63 of 2001). Section 8(c) of the Labour Laws Amendment Act provides, in subsection (cA), for parental benefits to be paid at a rate of 66 per cent of the earnings of the beneficiary at the date of application.

c. Parental leave

No statutory entitlement. (But see adoption leave and commissioning parental leave as described in section 1e).

d. Childcare leave or career breaks

- None (though some companies may provide such leave as part of their attraction and retention strategy).

e. Other employment-related measures

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 at least 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.
- The partner of an individual who adopts, or the other member of a couple adopting jointly, may be eligible for adoptive Parental leave and pay.
- 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.

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 consecutive weeks of leave, or with commissioning Parental leave, as described in section 25A of the BCEA.
- Section 25C(6) describes it as follows: ‘if a surrogate motherhood agreement has two commissioning parents, one of the commissioning parents may apply for commissioning Parental leave and the other commissioning parent may apply for the Parental leave referred to in section 25A: provided that the selection of choice must be exercised at the option of the two commissioning parents.’
- An employee who is the primary carer is entitled to paid leave associated with the adoption of a child and the payment of commissioning parental benefits, as 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 (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.

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 June 2018 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, June 2018). 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 in two categories:
 - (1) for the commissioning parent who, from 8 June 2018, may take four consecutive calendar months' paid leave, commencing from the date of the birth.
 - (2) for the surrogate mother, who will be entitled to six consecutive weeks' Maternity leave. The determination is silent on payment for the surrogate mother.

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 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 their 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.⁷
- According to the public service determination,⁸ 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:

⁷ Eisley, T. (ed.). (2013) *Bargaining Monitor*, Vol.27, 179, from the Labour Research Service. Available at: http://www.lrs.org.za/docs/LRS_BM_Strategic%20Bargaining%20in%202013.pdf.

⁸ Department of Public Service and Administration, June 2018

- 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 leave⁹ 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. 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 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 regarding the protection of employees during and after pregnancy⁹ 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

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

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.
- 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 the impact of these rosters on employees and their families, and should take into consideration 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. 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.

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. The 2018 General Household Survey (Statistics South Africa, 2019, p. 10)¹⁰ indicates that approximately 38.4 per cent of children up to the age of four attended day care or educational facilities outside their homes. The same survey indicates that 49.2 per cent stays at home with a parent or a guardian.

¹⁰ Statistics South Africa (2019) *General Household Survey*. 10. Pretoria: Stassa.

3. Changes in policy since April 2019 (including proposals currently under discussion)

According to the South African media, history was made in the South African Parliament on 27 November 2018, when a private member's bill was signed into an act by the President of South Africa. The Labour Law Amendment Act, proposed by ACDP MP Cheryllyn Dudley, gives fathers the opportunity to take Paternity leave. The purpose of this act is to augment the BCEA to provide for this leave, adoption leave, and commissioning Parental leave, as well as for providing payment of parental benefits from the Unemployment Insurance Fund. The act makes provision for Paternity leave, Adoption leave, as well as commissioning Parental leave.

Paternity leave: Section 25A of the BCEA was promulgated by s3 of the Labour Law Amendment Act and provides for ten consecutive days of leave for the father of a new-born child. The term 'Paternity leave' has not been used in the act (there it is labelled as 'Parental leave'). Subsection 5 describes the UIF payment set by the minister.

Adoption leave: Section 25B of the BCEA was promulgated by s3 of the Labour Laws Amendment Act and provides 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 BCEA was promulgated by s3 of the Labour Laws Amendment Act and 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 Insurance Act of 2001 has also been amended to include payments to adoptive parents as envisaged by the inclusion of parental and commissioning parental benefits.

Policy response to the Covid-19 pandemic up to end June 2020

- No information

4. Uptake of leave

a. Maternity leave

In the Quarterly Labour Force Survey 2019,¹¹ quarter three indicates that there are 23,109,000 people employed in South Africa. Of these, 13,739,000 have access to Maternity or Paternity leave: equating to 61.72 per cent of employees that were entitled to some form of Maternity or Paternity leave for that year (Statistics South Africa, 2019). However, there are no available figures for the take up of Maternity leave.

b. Paternity leave

There is no information on the uptake of family responsibility leave used for this purpose or for the uptake of Paternity leave provided.

c. Parental leave

There is no information on the uptake of Parental leave provided.

¹¹ Statistics South Africa (2019) *Quarterly Labour Force Survey*, Quarter 3: 2019