

# Basic Conditions of Employment Act 75 of 1997 (BCEA)

Topic: Employment/Labour/HR

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### Introduction

The Basic Conditions of Employment Act (BCEA) ensures that all employees are treated fairly and in accordance with the laws in South Africa.

### Objectives of the Act

The BCEA gives effect to fair labour practices and it lays down the basic standards of employment which will apply to all employees who are employed by an employer.

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### Application of the Act and its implication to Tourism

The BCEA applies to all people in an employment relationship, no matter how big or small the employer.

The BCEA does not apply to members of the National Defence Force, the National Intelligence Agency, the South African Secret Service or the South African National Academy of Intelligence or unpaid volunteers working for an organisation serving a charitable purpose.

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### Summary of the provisions of the Act

#### Contract of employment

Every employee must be given a written contract of employment, setting out the terms of that person's employment, such as place of work, position, disciplinary procedures, policies which apply to the employee and a job description.

The contract should simply make reference to the basic rights allowed under the BCEA, such as hours of work and leave, etc., unless proffered rights are greater than those allowed under the BCEA.

## **Exclusions**

While the BCEA applies to all employees, the maximum hours of work which an employee must work in a day or week and overtime payments for work performed on Sundays will not apply to senior managerial employees who earn in excess of R183 008.00 (one hundred and eighty-three thousand and eight rand) per annum with effect from 1 July 2012. Note: This amount is reviewed each year.

In addition, certain sections of the BCEA pertaining to working hours, meal intervals and overtime will not apply to employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work or to employees who work less than 24 hours a month for an employer.

## **Employment of children**

Any person who employs a child, assists to employ a child or contravenes the regulations made by the Minister may be liable to a fine or imprisonment for a maximum of three years.

All employers must ensure, as a minimum, that the following rights are granted to each and every employee employed by it.

## **Working times and pay**

The maximum hours of work are 45 hours per week for ordinary pay.

The maximum length of a working day is nine hours if the worker works a five-day week or eight hours if the worker works a six-day week. Where the working week is compressed into fewer days, shifts of longer hours may be introduced with the employee's consent. For example, an employee can agree to work shifts of 12 hours over four working days.

Overtime is voluntary. No worker may work more than ten hours of overtime per week. Overtime must be paid per hour of overtime worked, at a rate of one and a half times the worker's ordinary hourly wage. In addition, no employee may work more than 12 hours in any day, including overtime on that day.

Even though overtime is voluntary, if the employee agreed in the original contract to work overtime when necessary, then overtime must be worked. If the employee refuses to work overtime, he or she will be in breach of contract and the employer can take disciplinary action against the employee.

An employer who employs fewer than ten employees only needs to pay overtime at time and a third of the normal wage. The employer can also agree with the employee to work up to 15 hours' overtime during a week.

Note: While individual overtime is voluntary and subject to an agreement, a joint refusal by a number of employees to work normal overtime will probably constitute a strike or industrial action.

Payment for Sunday work must be the greater of double the normal hourly rate for the amount of Sunday hours worked or one full day's pay. If it is normally part of a worker's job to work on a Sunday, then he or she must be paid at a rate of time and a half of his or her normal hourly rate.

Workers are entitled to be paid for public holidays which fall on a day that they normally would have worked – even though they will be off and not working on the public holiday. A worker may volunteer to work on a public holiday, but he or she must get a normal working day off in exchange or must be paid double the normal hourly rate for the amount of hours worked on the day.

The public holidays are:

|              |   |
|--------------|---|
| 1 January    | New Year's Day                                |
| 21 March     | Human Rights Day<br>Good Friday<br>Family Day |
| 27 April     | Freedom Day                                   |
| 1 May        | Workers' Day                                  |
| 16 June      | Youth Day                                     |
| 9 August     | National Women's Day                          |
| 24 September | Heritage Day                                  |
| 16 December  | Day of Reconciliation                         |
| 25 December  | Christmas Day                                 |
| 26 December  | Day of Goodwill                               |

Night work after 6 pm and before 6 am is voluntary. Workers must be paid an extra allowance or have their working hours reduced. Transport must be available for the workers to get from their homes to work and back. The law is unclear as to who must provide or pay for such transport.

### **Flexibility in working hours**

The BCEA allows for some flexibility in the arrangement of working hours by agreement either between the employer and workers (collective agreement) or between the employer and one worker (individual agreement).

### **Compressed working week by collective or individual agreement**

Employees can work up to 12 hours of normal work on any day without receiving overtime pay. But the employees may still not work more than 45 normal hours per week and may not work on more than five days in a week. Any time worked beyond 45 hours in the week should be paid at overtime rates.

### **Averaging of working hours by collective agreement only**

Averaging of working hours by collective agreement means that workers can agree to work longer hours than the BCEA usually allows if they get the same number of extra hours off at a later time. For example, workers could agree to work longer hours in one week for normal pay if they work reduced hours for normal pay the following week. But the workers may not work more than an average of 45 ordinary hours per week during

this period. Also, the agreement cannot go on for longer than 4 months. Where reference is made to a collective agreement, this agreement should be made through the employees' trade union.

### **Payment in kind**

Wages can be partly paid in kind. This means that if the worker and the employer agree that wages will be partly paid in kind, the employer can pay the worker his or her wage through giving him or her housing, use of land, rations (food) or cash. This has been common with farmworkers and domestic workers.

The law says how much payment in kind is worth. It is often difficult to work out the value of payment in kind, so the law says that the value must be worked out as follows–

- either R100 per month; or
- 1/3 of the cash wage,

whichever is higher.

The employer and worker can also agree on what the real value of the payment in kind is. They can only do this if the value they agree on is more than what the law says. This agreement must be in writing. When you want to calculate any of the following, you must use the full wage (the cash wage plus the payment in kind)

- overtime pay;
- payment for work on Sundays and public holidays;
- payment for annual leave and sick leave; and
- contributions to and benefits from the UIF.

### **Deductions**

Deductions from wages (other than those required by law) are not permitted without the written consent of the worker.

The deductions required by law are as follows

- Unemployment Insurance Fund (UIF);
- SITE (tax); and
- any deduction ordered by a court.

In addition, an employee has the right to authorise the employer to make the following deduction where applicable

- trade union subscriptions;
- medical aid contributions;
- pension or provident fund contributions;
- money to pay back a housing loan or other loan from the employer;
- money for food and accommodation; and/or
- compensation for loss or damages suffered at work, provided that the employee has been given a hearing to explain the facts.

The amount that can be deducted can be equal to but not more than 25% of the normal wage to offset losses.

## **Daily and weekly rest periods**

No worker's hours of work may be spread over more than 12 hours per day. 'Spread over' means from the start of work to the end of work, including any breaks for meals or rest and any overtime.

A rest period of one hour is required after every five hours worked. This can be reduced to 30 minutes if the worker and employer agree in writing.

Every worker is entitled to a daily rest period of 12 hours from the end of work on one day to the start of work on the following day. This rest period can be reduced to 10 hours if a worker lives on the premises and gets a meal break of at least three hours (this may be relevant to domestic workers, caretakers, farmworkers, and so on).

Every worker is entitled to a weekly rest period of 36 continuous hours. For many workers, this would be over the weekend.

An agreement in writing between the employer and employee may reduce the meal interval to not less than 30 minutes or do away with a meal interval if the employee works less than six hours on a day.

The agreement can also provide for a rest period of at least 60 consecutive hours every two weeks.

## **Leave**

Leave can be annual leave, sick leave, maternity leave, family responsibility leave or unpaid leave.

### **Annual leave**

Every worker is entitled to 21 consecutive days' paid leave per year. This is the equivalent of three weeks' time off work.

The worker is entitled to take 21 days all in one go, but can choose to use the annual leave to take occasional days off work. The employer then deducts these days of occasional leave that a worker took during the year from the annual leave.

Annual leave must be taken within six months of the end of an annual leave cycle.

If the worker is off work on any other kind of leave, these days do not count as part of annual leave. In other words, annual leave cannot be deducted at the same time as sick leave, family responsibility leave or maternity leave.

If the leave period includes a public holiday, then the public holiday does not count as part of the worker's leave.

Annual leave cannot be taken at the same time as the notice period.

Leave pay is not a bonus on top of normal pay. It simply means that a worker gets a paid holiday every year. If a worker does not take leave, or all the leave, the employer will not pay out leave pay instead of leave.

If a worker leaves a job without having taken all the leave that is due to him or her, the worker must be paid for the days of leave that not taken. This is called pro rata leave pay.

## **Sick leave**

A permanent worker is entitled to paid sick leave of 30 days over any 3-year cycle or 36 days if the worker works a six-day week. During the first six months that a worker works for an employer, she or he gets one day's paid sick leave for every 26 days worked. Once all these paid sick leave days are used up, the employer does not have to pay the worker when he or she is off sick. An employee who works more than 24 hours during any month earns one day's leave for every 26 days worked.

Seasonal or temporary workers are entitled to one day's sick leave for every 26 days worked over the first six-month cycle.

Workers who are sick for more than two days may be required to produce a doctor's certificate. If a worker lives on the premises and it is difficult for him or her to get to a doctor (for example, in rural areas), the worker does not have to produce a certificate unless the employer gives the worker reasonable assistance to obtain the certificate.

Sick leave pay is not a bonus on top of normal pay. It simply means that if a worker is genuinely sick and has to take time off work, the employer must pay the worker up to a certain number of days. For example, if an employee only takes three days' sick leave this year, the employer does not owe him or her the money for the remaining sick leave days at the end of the year.

## **Family responsibility leave**

Every worker with more than four months' service with an employer, who works more than four days a week is entitled to three days' paid family responsibility leave per year. This can be taken when a direct family member dies or when a child is born or is ill. A total of three days is allocated for this kind of leave, not three days for each event.

## **Maternity leave**

Women workers are entitled to four months' unpaid maternity leave. During this time, the worker may draw maternity benefits from the Unemployment Insurance Fund.

Refer to the Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child.

## **Unpaid leave**

If an employer agrees to let a worker take extra days of annual leave or if a worker is sick for longer than the paid sick leave, the employer does not have to pay the worker for these days.

## **Absence without leave**

If a worker takes leave without the employer's permission and is not sick, the employer does not have to pay the worker for the time taken off.

If the worker takes off several days in a row without permission, normally more than four consecutive days, or often takes time off without permission, the employer may presume that the worker has left his or her employment without giving notice.

The employer may employ someone else to do the job. In this case, the employer does not have to give the worker notice. But should the worker return, fair dismissal rules must be followed.

### **Notice periods**

During the first six months of employment, workers will be entitled to at least one weeks' notice of the termination of their services. After the first six months but during the first year of employment, workers will be entitled to two weeks' notice. If they have worked for more than one year, workers are entitled to four weeks' notice. If an employment contract has a longer period of notice than the BCEA, the longer notice must be given.

Notice works both ways. If a worker resigns without giving the employer the correct amount of notice, the employer can claim the pay of the correct amount of notice from the worker.

Notice must be in writing.

Neither the employer nor the worker can give notice while the worker is on leave.

All workers are entitled to a written certificate of service when the worker stops working for that employer. The certificate of service sets out the full name of the employer and the worker, the job that the worker was doing, the date the worker began working, the date the worker ended work and the wage at the time that the job ended, including payment in kind.

### **Administration**

Except for workers who work less than 24 hours a month, an employer must give the worker written particulars about the job before the job starts, including

- a description of the job;
- the hours that the worker will be expected to work;
- ordinary and overtime rates of payment, including payment in kind and its value;
- any deductions to be made;
- how much leave the worker will get; and
- the notice period.

This document is like a contract of employment, but the worker does not have to sign it. If a worker cannot read, the particulars must be explained in a language the worker understands. An employer who employs fewer than five employees does not have to provide the above details.

The BCEA says that an employer must hand the worker his or her wages with certain details on a pay slip, including—

- the period for which the worker is being paid;
- the number of overtime hours worked;
- the number of hours worked on a Sunday or public holiday;
- the wages due to the worker (both normal and overtime);
- the amount and reason for any deductions made for tax, pension, UIF and so on; and
- the actual amount paid.

The BCEA states that the employers must keep the following records:

- the time worked by each worker; and
- the wages paid to each worker.

### **Prohibition of victimisation and exploitation**

The employer is not allowed to victimise a worker who refuses to do something that is against the BCEA. For example, if a worker says she cannot work overtime because her baby is sick at home, the employer cannot dismiss her; the BCEA states that an employer cannot make a worker work overtime without the worker's consent.



#### **WHAT HAPPENS IF YOU DO NOT COMPLY?**

##### **Criminal charges**

Criminal charges may also be brought against a non-complying employer in the criminal courts by the National Prosecuting Authority (NPA). If an employer is found guilty of non-compliance with the BCEA, he or she could be fined. The maximum permissible fines vary between R1 000 and R500 per employee in respect of whom the failure to comply occurs. Fines involving an underpayment vary between 25% and 200% of the amount due, plus interest. There is also a maximum term of imprisonment of three years.



#### **RECOMMENDED ACTIONS OR CONTROLS WHICH SHOULD BE IMPLEMENTED BY THE TARGET AUDIENCE TO ENSURE COMPLIANCE WITH THE ACT**

In order to demonstrate compliance with the BCEA, the employer should have the following documents or procedures in place:

##### **Employment contract**

Every employee must be given a contract of employment to sign, which must be kept on file and a copy provided to the employee.

##### **BCEA poster on wall**

All employees should be made aware of their rights. The employer must place a BCEA poster on walls in prominent areas around the workplace.

##### **Notice of earnings and salary slip**

An employee must be provided with a pay slip each month or week, depending on the frequency of payment, setting out the amount earned by the employee and all lawful deductions.



**Records of leave and non-attendances**

The employer must keep a record of the annual leave and sick leave taken by each employee.

**Policies and procedures**

Every employer should bring to the attention of each employee the various policies and procedures which pertain to an employee in the workplace.

**Safe and comfortable workplace**

Employers must comply with health and safety rules and regulations. Equally, employees must conform to these rules and regulations.

**FURTHER INFORMATION****Regulator**

The Department of Labour (DOL) oversees the administration of the BCEA.

**Website**

[www.labour.gov.za](http://www.labour.gov.za)