

EMPLOYMENT ALERT

LET OUR STRIKE GUIDELINES BE THE STARTING POINT FOR YOUR STRIKE STRATEGY

At Cliffe Dekker Hofmeyr we pride ourselves in providing our clients with practical solution driven information in line with the current challenges faced by our clients.

Due to the increase in strikes and strike violence in South Africa, our employment practice developed useful strike guidelines for our clients' benefit. These guidelines will provide clients with practical information about strikes, lock-outs and picketing and answer some of the more complex questions around these topics. The guidelines are definitely the starting point when considering a strike strategy and when preparing for industrial action. Our strike guidelines can be accessed on our website.

IN THIS ISSUE

MATERNITY LEAVE IS NO LONGER FOR MOM ALONE – BUT IT'S STILL BABY STEPS FOR NOW

The provision of leave benefits has always been a highly debated topic. We previously wrote on the landmark judgment of *MIA v State Information Technology Agency (Pty) Ltd* (D 312/2012) [2015] ZALCD 20 wherein a male employee in a Civil Union applied for maternity leave in anticipation of the birth of his surrogate child and on account of the fact that he would take the role of primary caregiver, which is ordinarily performed by the birthmother. The employer denied his request for maternity leave.

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The provision of leave benefits has always been a highly debated topic. We previously wrote on the landmark judgment of *MIA v State Information Technology Agency (Pty) Ltd* (D 312/2012) [2015] ZALCD 20 (SITA case) wherein a male employee in a Civil Union applied for maternity leave in anticipation of the birth of his surrogate child and on account of the fact that he would take the role of primary caregiver, which is ordinarily performed by the birthmother. The employer denied his request for maternity leave.

The dispute was referred to the Labour Court, which held that the right to maternity leave in terms of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) is an entitlement which is not solely linked to the welfare and health of the child’s mother, but is also connected to the child’s best interests. Accordingly, the Labour Court held that there is no reason why the employee, in the position that he was, should not be entitled to ‘maternity leave’ and equally there is no reason why such maternity leave should not be for the same duration as the maternity leave to which a natural mother of a child is entitled and during which time care is to be provided to a new born child.

While this judgment does not provide blanket protection to fathers in all parenting scenarios, the Labour Court illustrated that in appropriate circumstances, it may come to the assistance of primary caregivers who are not statutorily entitled to maternity leave.

In fact, the SITA judgment has paved the way to the development of the current Labour Laws Amendment Bill and its proposed amendments to the BCEA’s leave provisions.

On 20 October 2017, Parliament’s Portfolio Committee on Labour issued an invitation to the public for comments on the Bill and its proposed amendments. The purpose of the Bill is to, among other things, “provide for parental, adoption and commissioning parental leave to employees”, which leave benefits are currently not provided for in the BCEA.

The Bill proposes that an employee, who is an adoptive parent of a child who is below the age of two, be entitled to 10 consecutive weeks’ adoption leave from the date of the adoption order. In other instances, such as where the child is over two years old, the adoptive parent may be entitled to 10 consecutive days’ parental leave. This 10-day parental leave is also applicable to other non-birth giving parents upon the birth of their child, such as fathers and/or non-primary care giving spouses.

Currently, in terms of s27 of the BCEA, fathers are only entitled to take three consecutive days’ family responsibility leave when their child is born. The Bill’s proposed parental and adoptive leave benefits seek to increase this entitlement.

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CONTINUED

It appears that the Bill and Parliament’s Portfolio Committee on Labour’s call for comments seeks to codify the shortfalls that the SITA judgement identified.

The SITA judgment clearly acknowledged that in its current form, the BCEA did not protect all categories of parents and more importantly, the child’s interests where he/she is not born to his/her biological mother who is entitled to four months maternity leave. In fact, the judgment held that “it is clear that in order to properly deal with matters such as this it is necessary to amend the legislation and in particular the Basic Conditions of Employment Act”.

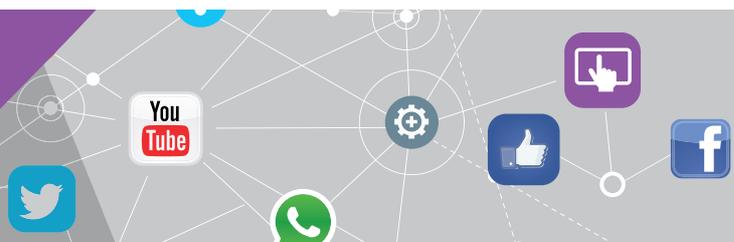
It, therefore, appears that the Bill and Parliament’s Portfolio Committee on Labour’s call for comments seeks to codify the shortfalls that the SITA judgement identified.

While the proposals in this Bill are most certainly a positive step to enhancing the rights of adoptive and spousal partners, the Bill is still required to go through the remainder of the legislative approval process. Further updates to follow.

Nicholas Preston and Sean Jamieson



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Employment Strike Guideline

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Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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