

WIETA				
	Code Principle	Fair Hours and Working Conditions	Date	May 2016
	Subject	Prohibition of Child Labour & Forced Labour	Benchmark Ref	07.03(a) – (c)
	Resource	SA Labour Guide: Easy Guide to Annual Leave		

## Easy Guide to Annual leave

This guide is published assist both employers and employees in better understanding annual leave in terms of section 20 of the Basic Conditions of Employment Act (BCEA).

It is important to note that employers and employees that are bound by collective agreements concluded on a Bargaining Council level are excluded from the provisions of the BCEA. The parties are therefore advised to consult with the relevant council regarding annual leave provisions applicable to employees employed in that specific industry.

### How much leave is an employee entitled to?

Employees that work more than 24 hours per month for the same employer are entitled to 21 consecutive days’ annual leave in a 12 month cycle. This is to ensure that employees are given the opportunity to be away from work and rest for three consecutive weeks. This however does not mean that the employee will be paid for 21 days whilst on annual leave, the employee will be paid for the days that he/she would normally have worked in a typical three week cycle. If the employee works 5 days a week then only 15 days will be paid during the leave period. If the employee works only 3 days per week then he/she will be paid for only 9 days during the leave period.

An employee that works on 5 days per week would therefore accumulate annual leave during the 12 month leave cycle at a rate of 1.25 paid leave days per month.

The BCEA makes provision for employers and employees to agree on 1 day annual leave for every 17 days worked or 1 hour annual leave for every 17 hours worked. This method is normally agreed upon where an employee will not work for a fixed number of days or hours per week.

### When can leave be taken?

Accumulated annual leave can be taken either during a leave cycle or after the completion of a leave cycle. An employee may therefore in example apply for 5 consecutive days’ annual leave during month 6 of the leave cycle. If the employer can do without the services of the employee for the 5 days then the employee must be allowed to take the leave days but cannot later claim his or her full 15 paid days at the end of the leave cycle.

Having said this it is important to note that annual leave may be taken at a time agreed upon between the employer and employee or at a time determined by the employer. The employer and employee may therefore for instance agree in either a contract of employment or a policy that annual leave will be taken

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during the December shutdown. The employer would under such circumstances be correct in not allowing an employee to take annual leave during the year, on a date other than during the agreed shutdown. An employee that does not have enough accumulated leave available to cover the full period of the shutdown will unfortunately not be paid for the full shutdown period.

If there is no agreement in place stipulating when annual leave may be taken, then the employer will determine when annual leave may be taken. Therefore an employee cannot demand to take annual leave if it is for the employer operationally not possible to do without the services of employee at that specific time.

An employer must however allow an employee to take annual leave during the 6 months after the completion of a leave cycle. In other words the employee must be granted the opportunity to take annual leave during months 13 to 18 after the completion of the 12 month leave cycle. At this stage the employee will be in a position to demand that 21 consecutive days annual leave be granted within the 6 months, again at a time determined by the employer in terms of its operational requirements.

**Can annual leave be taken during maternity leave?**

Yes. Section 20(6) of the Act states that an employer must allow an employee, at the written request of the employee, to take annual leave during any period of unpaid leave. If the employee therefore completes a leave application form and submit it to the employer in order to ensure payment during a period of unpaid leave, the employer must allow it. The employer will then reduce the employee’s accumulated annual leave accordingly and pay the employee during the period of unpaid leave. The same will be applicable where an employee is ill and does not have any sick leave available in order to ensure payment during the period of incapacity.

**What about public holidays during a period of annual leave?**

As per section 20(8) of the BCEA an employer must extend an employee’s annual leave by one day for every public holiday during the annual leave period or credit the employee with one day’s annual leave for every public holiday during the leave period. During December 2012 and January 2013 there will 4 public holidays and a 5<sup>th</sup> one on a Sunday.

**Annual leave during a period of notice:**

The employer may not force an employee to take annual leave during any period of notice, and the employee is prohibited from taking annual leave during any period of notice.

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### Can I exchange my annual leave for cash?

The employer is prohibited by section 20(11) from paying an employee for annual leave except upon termination of employment. The only exception here would be if the employer allows more than minimum statutory annual leave per cycle. If the employee that only works 5 days a week is granted 20 paid days' leave per cycle, then the 5 days in addition to the 15 paid days' may be regulated by a policy and either be forfeited or paid out to the employee.

#### Calculation of leave pay:

The Minister of Labour issued a determination in Government Notice 691 dated 23rd May 2003, stating that the following method of calculating employee's remuneration for the purposes of annual leave in section 21, payment instead of notice in terms of section in 38 and severance pay in terms of section in 41 of the Basic Conditions of Employment Act. This determination became effective on the 1st July 2003 and was made in accordance with section 35(5) of the BCEA.

1. The following payments are included in an employee's remuneration:
  - a. housing or accommodation allowance or subsidy; or housing or accommodation received as a benefit in kind. Any housing or accommodation allowance or subsidy paid in cash, or the value thereof if paid in kind, is deemed to be part of remuneration.
  - b. car allowance or the value of provision of a company car. This does not apply in those instances where the employer provides a vehicle to the employee so as to allow the employee to travel to and from work, with no other private usage of the vehicle by the employee.
  - c. any cash payments made to an employee, except those listed as exclusions is in 2 below.
  - d. employer's contributions to medical aid, pension, provident or similar funds or schemes, must be considered as part of the employee's remuneration and must be included when making calculations in terms of this notice.
  - e. employer's contributions to funeral or death benefit schemes also form part of remuneration and must be included in the calculation of remuneration.
  
2. The following items do not form part of the employee's remuneration for the purpose of these calculations:
  - a. any cash payment or payment in kind that is provided in order to enable the employee to work (for example, equipment, tools or a similar allowance, or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work only.
  - b. a relocation allowance

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- c. gratuities, for example tips received from customers, and gifts received from the employer.
- d. share incentive schemes.
- e. discretionary payments not related to the employee's hours of work or performance, for example a discretionary profit-sharing scheme.
- f. an entertainment allowance
- g. an education or schooling allowance.

3. The value of payments in kind must be determined as follows.

- a. a value agreed to in either a contract of employment or collective agreement, provided that the agreed value may not be less than the cost to the employer of providing the payment in kind; or
- b. the cost to the employer of providing the payment in kind.

(Employers who provide accommodation to the employees, or any other benefits in kind, are advised to enter into a written agreement with the employee regarding the value of the accommodation or other benefits provided in kind.)

4. An employee is not entitled to a payment or the cash value of a payment in kind as part of remuneration if:

- a. the employee received the payment or enjoyed, or was entitled to enjoy, the payment in kind during the relevant period.
- b. in the case of a contribution to a fund or scheme that forms part of the remuneration, the employer paid a contribution in respect of the relevant period.

5. This schedule applies only to pay for annual leave accrued from the date of operation of this schedule.

6. If the payment fluctuates, it must be calculated over a period of 13 weeks or if the employee has been in employment for shorter period, over that period.

7. A payment received in a particular period in respect of a longer period (e.g. a 13th cheque) must be calculated pro rata.

8. This schedule applies only to the minimum payments that an employer is required to make in terms of the Basic Conditions of Employment Act, 1977.

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 Wine and Agricultural Ethical Trade Association	Code Principle	Fair Hours and Working Conditions	Date	May 2016
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### Sick leave during annual leave:

Must an employer credit back annual leave if the employee was declared medically unfit during a period of annual leave? It is possible that an employee may become ill during a period of annual leave and insist that the employer must treat the period of annual leave a sick leave. Many employers believe that they must do this in terms of section 20(5) of the Act that states that an employer may not allow an employee to take annual leave during any other period of leave that the employee may be entitled to.

The above has however never been tested in court and there are two different views on this issue. It is my view that section 20(5) is specifically aimed at situations where an employee is scheduled to work and becomes ill. The employer may under such circumstances not allow or request an employee to take annual leave instead of sick leave if the employee has sick leave days available.

If the employee was not scheduled to work then sick leave cannot be applicable. In order to better understand this statement we need to look at section 23 of the Act that deals with the payment of sick leave.

Section 23(1) states:

An employer is not required to pay an employee in terms of section 22 (for sick leave) if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

It is therefore clear that sick leave as well as the payment of sick leave is limited to instances where the employee was “absent from work” as result of illness.

Based on the above it is clear that during the period of annual leave the employee was neither “unable to work” nor “absent from work” on “account of sickness or injury”.