



▪ MKHABELA HUNTLEY ATTORNEYS INC ▪

# HEADING INTO THE HOLIDAYS A QUICK GUIDE FOR EMPLOYERS

The annual festive season can be a tricky period for employers, navigating leave arrangements and payment for public holidays. We have prepared a short guide that outlines some of the legal issues that should be considered over the holiday period.

## Annual Leave Entitlements

The Basic Conditions of Employment Act 75 of 1997 (BCEA), stipulates that employers may not require an employee to work during any period of annual leave. Annual leave must be taken in accordance with an agreement concluded between employer and employee, and if there is no such agreement, leave must be taken at a time determined by the employer. The minimum amount of leave due is 15 working days after the employee has worked for one year.

During December and January, there are three types of scenarios that arise for businesses:

1. Those that implement a full annual shutdown. These are companies that close their offices on a specified date in December, and do not recommence operations until the festive season has come to an end in January (usually from 15 December to 15 January). Generally, no one is required to work over this period and therefore employees are required to take what is known colloquially as "forced leave". That would mean that employees usually take all their annual leave at one time.
2. Those that implement a partial annual shutdown. These companies require only "skeleton staff" to keep operations going.
3. Those that do not have an annual shutdown at all, such as those that operate in the essential services, or the emergency, manufacturing, retail, security, Fast-Moving Consumer Goods ("FMCG) and hospitality industries. Most if not all of the employees in these businesses will accordingly be required to work. This is a busy period for those employers, and all hands on deck are needed.

The powers and obligations of the employer regarding annual leave differ in each case, depending on which of the above three categories its business falls into.

### **Full shutdown**

For businesses that undergo a full shutdown, employees should be informed what periods the business will be shut down, and that leave must be taken over those dates. If the employee does not have enough accrued leave (for example, recently employed employees) the leave taken may be treated as unpaid leave. Generally, however, employees are paid in full over December and their leave entitlements go into a deficit. These employees are then required to 'work back' the leave taken.

### ***Partial shutdown***

In cases of a partial company shutdown, those members of staff who will not be required to work over the festive season, will be required to take forced annual leave. By contrast, those who are still required to carry out their duties will be required to work. It is for the employer to determine which members of staff will work, and which members will not. This depends on the nature of the business and the duties of the employees.

It is advisable for an employer to clarify in their employees' contracts that they may be required to either work or take annual leave over the festive season, depending on the operational needs of the employer's business.

It is also good practice for the employer to timeously communicate to employees which staff will be required to work over December, and which staff will not (assuming this has not been agreed to already, either in the employee's contract or otherwise).

### ***No shutdown***

In businesses that do not shut down over the festive season, it will be business as usual, and employees will be required to work.

## **Public Holidays**

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The President has declared Friday, 15 December a public holiday. Thank you Bokke! This means that this year, there will be consecutive public holidays on 15 and 16 December.

Those who work a normal work week (Monday to Friday) will therefore miss out on a 'day off' on the public holiday of 16 December, as it falls on a Saturday and it is only when a public holiday falls on a Sunday that the holiday moves to the following Monday.

The permutations can be a bit confusing, so here is an outline of the obligations bestowed on employers by the BCEA:

### ***Friday, 15 December***

- Those who ordinarily work on Fridays but are not working on 15 December, will get the day off on full pay.
- Those who ordinarily work on Fridays and who work on 15 December, must be paid double, or they may exchange the day off for another day (i.e., work on Friday and elect to take another day off).
- Those who do not ordinarily work on Fridays and who do not work on 15 December will miss out on the day. (The employer does not have to "make up" that day for the employee)
- Those who do not ordinarily work on Fridays but who work on 15 December will be entitled to double pay.

### ***Saturday, 16 December***

- Those who ordinarily work on Saturdays but are not working on 16 December, will get the day off on full pay.
- Those who ordinarily work on Saturdays and who work on 16 December, must be paid double, or they may exchange the day off for another day (i.e., work on Saturday and elect to take another day off).
- Those who do not ordinarily work on Saturdays and who do not work on 16 December will miss out on the day.
- Those who do not ordinarily work on Saturdays but who work on 16 December will be entitled to double pay.

## Further Questions

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### **How should a business manage employees who request to work from home over the festive season?**

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It is common for employees to request to work from home during the festive season. Employers retain a discretion regarding whether to allow such an arrangement and are guided by the terms of the employment agreement.

A request to work from home over December that emanates from an employee who generally does not work remotely, should be reasonably considered and take into account factors such as the nature of the business's operations, the duties of the employee, whether the duties of the employee can be tailored to accommodate working from home, and the employer's interest in consistent application of its policies. In all cases, working from home will only be permitted if the express written consent of the employer is obtained.

### **What should a business do when an employee is required to work over December, but cannot be contacted?**

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Where an employee is required to work over December but, for whatever reason, has gone AWOL and failed to report for duty, it is advisable for the employer to first determine the reason for the employee's absence. It should be ascertained whether the employee's absence is wilful or due to reasons beyond the employee's control. Generally, a written warning would suffice in isolated cases of absenteeism. If the employee's absence is wilful and/or persistent, however, the employee may be charged with desertion and even dismissed. Each and every case should be dealt with on its own merits, and the employer should be guided by its own policies and procedures.

### **What should a business do when an employee does not return on the day that they are supposed to return to work?**

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Employees frequently fail to return from leave once the festive season has come to an end.

It has become trite that in cases of abscondment or desertion, the obligations of the employer are not limited to making efforts to trace the whereabouts of the employee, investigating the reasons for the employee's absence, and/or demanding that the employee return to work. The employer cannot dispense with pre-dismissal procedures. If the employee returns to the workplace, the employer should convene a disciplinary hearing to allow the employee to answer to allegations of misconduct. If the employee never returns, they can be deemed to have deserted and may be taken off the company's books.

**- MHA Labour and Employment Department**

