Greetings to our clients!

The new year has dawned and there is more to do than ever, it seems.

We at Invictus understand that although people may go on vacation, business does not. Anyone who has come back from leave to find a pile of work waiting on their desks know this.

With this in mind we have compiled a newsletter dealing largely with some of those issues and questions we received during the festive season.

We at Invictus would like to remind our clients that we are always available and look forward to doing all we can to ensure the new year will be a prosperous one.

Kind regards
The Editor

HOLIDAY LEAVE

The leave entitlement of the employee is enshrined in the BCEA, which promises a minimum of 21 consecutive days (i.e. 15 working days if you work a 5 day week and 18 working days if you work a 6 day week) worth of leave per annum. But how much control does the employer retain in terms of the management of an employee’s annual leave? That is the subject of this article.

To get the basics out of the way: ALL employees are entitled (under the BCEA) to annual leave. This includes permanent staff, contract staff, casuals, etc. The only type of employee NOT entitled to annual leave is the one working less than 24 hours in any given month – unless other direction is given by the applicable Main Agreement or Sectoral Determination.

Normally an employee will request a term of leave from his employer. It is within the
rights of the employer to refuse to grant such leave and even to refuse the granting of unpaid leave. After all, an employer might be short staffed or unable to spare the employee during the busiest time of the season. Dismissals have been upheld as fair in both the CCMA and the Labour Court when employees have autonomously taken unpaid leave despite permission for such being denied by the employer.

There is, however, a catch to this and it is two pronged. The BCEA states, firstly, that an employer MUST grant leave “no later than six months after the end of the annual leave cycle” in which it became due. And secondly, that the employer is not allowed to pay the employee in lieu of leave taken (except on resignation/dismissal). In other words, an employer cannot allow an employee’s leave days to lapse and opt simply to pay the employee their worth instead.

These two sections, read together, means that if an employee has been consistently refused his annual leave (perhaps because the employer cannot spare him or her) and the employee now has 21 days worth of consecutive leave time accrued and only 21 days before the end of the annual leave cycle, the employer CANNOT refuse the employee taking his annual leave. If the employer is in desperate need of his employee at this time, this could put the employer’s business at risk. It is therefore suggested that employers be conservatively fair in doling out leave permission as needed by employees.

The reverse, of course, is also possible: that an employee has exhausted his or her annual leave entitlement and now faces the company’s annual shutdown period with no accrued leave. This sometimes happens, for example, when an employee has exhausted their sick leave entitlement and has dipped into their annual leave to augment it. The employer is now faced with the problem of either requiring the employee to work throughout December (assuming the company has no official shutdown period) skipping only the public holidays, or of granting the employee unpaid leave during the shutdown period.

The former option seems unsatisfactory, as there is normally no business being conducted during this period and the employer is, in essence, paying the employee to sit at the office and do nothing. The latter option seems unfair toward the remaining employees, who have managed their leave entitlement carefully in order to take time off during this annual shutdown.

The solution, of course, lies in the employment contract. The parties can agree
that a portion of the employee’s annual
leave is always put aside to be used for the
annual shutdown. That way, should the
employee require leave during the working
year, they cannot “borrow” against the
portion of leave that is set aside and must
apply for unpaid leave should they require
time off.

This is an imperfect solution and is by no
means the only problematic question
concerning leave. It is however all there is
time for in this month’s newsletter. Feel free
to contact Invictus or your regular service
provider for more information on leave-
related troubles.

HUMAN RESOURCES

HOLIDAY PAY

In South Africa there exists a closed list of 12
official, government sanctioned public
holidays which all employers are law bound
to observe. This list can be found on the
official government information website,
which should be consulted by all employers
at least once a year.

This information is important to employers
as it relates to rate of pay of their
employees. After all, many businesses –
specifically in the retail and in the hospitality
sectors, which concentrate on customer
service – do some of their most brisk trade
on public holidays.

Take the example of an employee who
habitually works Monday to Friday. Should a
public holiday happen to fall on a Friday (as
happened on Freedom Day last year), then
that employee does not work on that Friday
but still receives remuneration as though he
had worked. This is the general
understanding of the operation of a public
holiday.

Now, should that public holiday fall on a
Saturday (as happened on Youth Day last
year) our hypothetical employee here above
would not have been paid for that holiday
because he does not normally work on
Saturdays. This is an important distinction,
as we will see later.

But what if the employee had been required
by agreement to work on that Friday? The
BCEA requires that such employee be paid
(at minimum) twice what he would
ordinarily have been paid for work on that
Friday.

We say “at minimum” because should the
actual work performed by the employee on
that Friday amount to more than his usual
remuneration (for example if the shift on
that day happens to be 2 hours longer than
normal or if a cook should be required to fill
in for the higher paid head cook) then that employee is entitled to his normal Friday remuneration plus whatever he actually earned on the Friday in question.

Now what if that employee had been required to work on the public holiday that fell on a Saturday instead? Oddly the BCEA does not here prescribe twice the employee’s ordinary daily wage as a minimum but requires that the employee be paid only his ordinary daily wage plus whatever the employee actually earned on the public holiday he worked.

There is, therefore, the possibility that the employee would be earning less than twice his ordinary daily wage for work on a day that was not only a public holiday but also one which fell on a day the employee does not normally work. This seems less beneficial than the entitlement of employees who perform work on public holidays which fall on days those employees would normally work and therefore seems oddly inconsistent with the spirit of this section of the BCEA. This lapse has been remedied in various Main Agreements and Sectoral Determinations.

An employee who habitually performs work on a Sunday would not be benefitted by a public holiday falling on a Sunday, as all such holidays are, by law, moved to the following Monday. But Sunday work is a separate issue, with its own prescribed higher rate of pay. If such an employee also happened habitually to work on a Monday, they would receive the benefit of both Sunday and Public Holiday entitlements.

Contact Invictus or consult your applicable Main Agreement of Sectoral Determination to determine the public holiday entitlement scheme in operation for your enterprise.

LABOUR DEPARTMENT

CRACKDOWN ON HOSPITALITY

The Department of Labour has vowed to increase the visibility of its inspection and enforcement services in the next financial year (2013) to ensure that employers comply with all labour laws. This was revealed at a hospitality seminar in George, Western Cape.

The event was attended by stakeholders from government, business, labour, non-governmental organisations as well as the International Labour Organisation (ILO). Virgill Seafield, chief director responsible for advocacy and statutory services in the department, said the decision follows results of blitz inspections conducted nationally last
year that showed that of the 1174 workplaces visited, a whopping total of 730 were not complying with the sectorial determination.

"It is disturbing to note that some employers failed to comply in terms of the minimum wage levels, information concerning pay, ordinary hours of work, annual leave, overtime, maternity benefits as well as the occupational health and safety regulations," he said.

Seafield, who delivered the keynote address on behalf of labour's Director-General, Nkosinathi Nhleko, said this picture suggests that things have not changed from previous years.

Boikie Mampuru, from the department's occupational health and safety division, said in the 2012 inspections, some employers did not register employees for the unemployment insurance fund as well as the compensation for occupational injuries diseases Act.

Mampuru said the next financial year (2013) will see shop stewards being trained in the areas of all labour legislation. Equally important, he said, was to "strengthen social partnership with organised business and labour...".

**LEGAL**

**BONUSES**

The Labour Law as a whole is silent on the question of bonuses, giving employers the freedom to regulate their own policies and procedures relating to the payment of bonuses. This also means that employers are free not to pay bonuses at all, if they so choose.

Hence, an employer who has never paid bonuses is free at any point to begin doing so. However, an employer who has been paying bonuses is prohibited from varying this established practice.

This prohibition has nothing to do with any statutory entitlement of the employees to bonuses but relates to the right of the employees to be free from unilateral changes to the terms and conditions of their employment by their employers.

In other words, since the employer has as a general rule been paying bonuses, this practice has created with the employees a legitimate expectation of receiving bonuses. This expectation is equated with the terms and conditions of the employees’ employment, as though specifically stated in their contracts.
Many employers hearing this argument for the first time are understandably taken aback and refer to clauses in their contracts of employment which state that bonuses are discretionary or based on the performance of the individual employees or the business as a whole.

Unfortunately, if bonuses have been consistently paid – and paid according to some uncertain discretionary impulse or with reference to some other system of measurement which remained undisclosed and unscrutinized – an expectation could understandably have been created with the employees.

This is especially likely if the bonus is termed a “13th cheque” which, on the face of it, purports to be a scheduled payment reliant on timing and not on merit or external circumstance.

This does not mean that the employer is now bound to continue paying bonuses indefinitely: there is a way of curing this legitimately held expectation and that is to engage in consultation or negotiation with the affected employees.

In these consultations the employer must seek an acceptable compromise with its employees in terms of how the expected bonuses are to be diminished, allocated, calculated, split or changed in any other way to give direction to this expectation. The goal might even be to wean the employees off their expectation of bonuses completely, over time.

Employers need not fear a stalemate or deadlock in these consultations. As long as these consultations were fairly and timeously held, employers with legitimate business concerns and rationale may implement their new system regardless of a lack of agreement (unanimous or otherwise) by their employees.

This is not to say that some employees will not approach the CCMA or Labour Court seeking relief in terms of alleged unilateral changes to their conditions of employment. However, as long as the employer can show the fairness of the procedure followed as well as that the rationale behind its implemented change to the bonus structure, there is little to fear.

This picture changes entirely should the employer attempt to force its employees to accept these changes under threat of dismissal. But that, of course, goes without saying and is the subject of a different article altogether.

It is no surprise, bearing in mind the complicated nature of this issue, that various
Main Agreements and Sectoral Determinations have made specific provision for the payment of bonuses. Employers should consult these agreements and determinations before contracting with their employees one way or the other concerning bonuses. Alternatively, contact Invictus or your regular service provider.