

Remote working - no reason to overlook annual leave

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Flexibility reigns in the Covid-19-era of remote working, driving trends such as semigration where professionals can escape the big city for the coast or countryside without taking a pay cut. However, with this inherent flexibility comes the assumption that, since an employee's workplace is conveniently situated wherever they are, they are easily able to work outside of what would in the past have been considered as office or working hours. Welcome to the always-on culture.



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While many employers and employees are fast adapting to an anywhere, always-on workplace, they remain bound by labour laws relating to reasonable regulation of working hours and annual leave.

More and more, we hear about employees finding it hard to switch off completely, even when on their statutory annual leave. Employers could start seeing a trend where employees take less annual leave, or are tempted to work while on leave, and ultimately forfeit more annual leave that is not taken on time.

This would not sit well with the Basic Conditions of Employment Act (BCEA), 1997, as amended. The rationale in providing a minimum right to annual leave includes that employees need a certain amount of time to rest and recharge, and to immerse themselves in their personal and family lives.

Time to rest and recharge

The BCEA prescribes the minimum number of statutory annual leave days an employer must grant an employee on full remuneration, as well as when these leave days must be taken.

The prescribed statutory annual leave days are:

- at least 21 consecutive days' annual leave for each annual leave cycle; or
- by agreement, one day of annual leave for every 17 days that the employee worked or was entitled to be paid; or
- by agreement, one hour of annual leave for every 17 hours that the employee worked or was entitled to be paid.

In the ordinary course, this translates to 15 working days of statutory annual leave for every annual leave cycle. These days must be taken not later than six months after the end of the cycle when the leave accrued, failing which they are forfeited. This use-it-or-lose-it provision is intended to ensure that employees do take the annual leave to which they are entitled.

Remote or flexible working does not change the underlying assumption of the BCEA that employees need to rest and recharge. If anything, it amplifies it: if the always-on working culture has the undesired effect that employees take less annual leave or work during their leave, enforcing the statutory leave provisions arguably becomes even more important. Employers are expected to play an important role here.

Working during annual leave is legally off-limits

Section 20(9) of the BCEA states that an employer may not require or permit employees to work for their employers during any part of their annual leave. Requesting an employee to work or even contacting an employee while on annual leave would be in breach of the BCEA.

Significantly this includes above-threshold earners and managerial staff.

If the work must continue while an employee is on leave, appropriate arrangements should be made for the person's tasks to be handled by another team member. Employers ought to incorporate this requirement into their leave policies to ensure that their businesses continue to run smoothly and to limit the necessity to contact the employees on annual leave.

If employees do not apply for annual leave within the prescribed period, employers should require them to take their leave. This may mean going so far as to inform the employees that, as a result of failing to apply for annual leave within the required period, the employees will, to avoid forfeiture, be placed on annual leave for the period concerned.

Employers are also reminded that aggrieved employees who are not granted their required statutory annual leave within the prescribed period could pursue enforcement mechanisms in terms of the BCEA. This may result in a compliance order, followed by a fine ranging from R300 to R1,500 on each occasion.

Better record keeping needed

Some extra effort may need to be invested in annual leave record keeping.

Although the BCEA is clear that annual leave may only be taken by agreement with or at a time directed by the employer, annual leave is not always properly recorded, particularly with businesses that do not have shift work. Employers must ensure they keep detailed records of each employee's annual leave.

Further, through a policy or other appropriate instruction, employees must be informed that they are required to record the annual leave they take. This must be done in whatever manner is prescribed by the employer, failing which appropriate disciplinary measures may be taken. Ideally, human resources or line managers should monitor this to ensure effective enforcement, where necessary.

The minimum entitlement to undisturbed annual leave has a distinct purpose in our law and employers should ensure they continue to comply with these statutory requirements. In any event, it is in an employer's best business interests to have a motivated and productive workforce.

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