

REPUBLIC OF SOUTH AFRICA

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**LABOUR LAWS AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 75))*

*(The English text is the official text of the Bill)*

(Cheryllyn Dudley MP)

[PMB 5 – 2015]

## GENERAL EXPLANATORY NOTE:

[            ]        Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_        Words underlined with a solid line indicate insertions in existing enactments.

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## BILL

**To amend the Basic Conditions of Employment Act, 1997, so as to correct an obsolete reference to an Act; to provide for parental, adoption and commissioning parental leave to employees; to provide that a collective agreement may not reduce an employee's entitlement to parental, adoption or commissioning parental leave; to amend the Unemployment Insurance Act, 2001, so as to provide for the right to claim parental and commissioning parental benefits from the Unemployment Insurance Fund; to provide for the application for, and the payment of, parental and commissioning parental benefits from the Unemployment Insurance Fund; to correct an obsolete reference to an Act; to provide that the number of contributors to whom parental and commissioning parental benefits were paid and the amount of such payments be included in the written report from the Director-General to the Minister; and to provide for matters connected therewith.**

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 75 of 1997, as amended by section 1 of Act 11 of 2002, section 40 of Act 65 of 2002, section 26 of Act 68 of 2002, section 25 of Act 52 of 2003, section 53 of Act 11 of 2013 and section 1 of Act 20 of 2013**

1. Section 1 of the Basic Conditions of Employment Act, 1997 is hereby amended by the substitution for the definition of “employment law” of the following definition:

“ **‘employment law’** includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

- (a) The Unemployment Insurance Act, [1966 (Act No. 30 of 1966)] 2001 (Act No. 63 of 2001);
- (b) the Skills Development Act, 1998 (Act No. 97 of 1998);
- (c) the Employment Equity Act, 1998 (Act No. 55 of 1998);
- (d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and
- (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);”.

**Amendment of section 25 of Act 75 of 1997**

2. Section 25 of the Basic Conditions of Employment Act, 1997 is hereby amended by the substitution for subsection (7) of the following subsection:

“(7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, [1966 (Act No. 30 of 1966)] 2001 (Act No 63 of 2001).”.

**Insertion of sections 25A, 25B and 25C in Act 75 of 1997**

3. The following sections are hereby inserted after section 25 of the Basic Conditions of Employment Act, 1997:

**“Parental leave**

- 25A. (1) An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave.
- (2) An employee may commence parental leave on —
- (a) the day that the employee’s child is born; or
  - (b) the day that the adoption order is granted.
- (3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to —
- (a) commence parental leave; and
  - (b) return to work after parental leave.
- (4) Notification in terms of subsection (3) must be given —
- (a) at least one month before the —
    - (i) employee’s child is expected to be born; or
    - (ii) adoption order is expected to be granted; or

(b) if it is not reasonably practically to do so, as soon as is reasonably practicable.

(5) The payment of parental benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

### **Adoption leave**

25B. (1) An employee, who is an adoptive parent of a child who is below the age of two, is subject to subsection (6), entitled to—

(a) adoption leave of at least ten weeks consecutively; or

(b) the parental leave referred to in section 25A.

(2) An employee may commence adoption leave on the day that the adoption order is granted.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence adoption leave; and

(b) return to work after adoption leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before the adoption order is expected to be granted; or

(b) if it is not reasonably practically to do so, as soon as is reasonably practicable.

(5) The payment of adoption benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

(6) If an adoption order is made in respect of two adoptive parents, one of the adoptive parents may apply for adoption leave and the other adoptive parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two adoptive parents.

(7) In this section, unless the context otherwise indicates—

“**adoptive parent**” has the meaning assigned to it in section 1 of the Children’s Act, 2005 (Act No. 38 of 2005); and

“**adoption order**” means an adoption order as envisaged in the Children’s Act, 2005 (Act No. 38 of 2005).”

### **Commissioning parental leave**

- 25C. (1) An employee, who is a commissioning parent in a surrogate motherhood agreement is, subject to subsection (6), entitled to—
- (a) commissioning parental leave of at least ten weeks consecutively; or
  - (b) the parental leave referred to in section 25A.
- (2) An employee may commence commissioning parental leave on the date a child is born as a result of a surrogate motherhood agreement.
- (3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—
- (a) commence commissioning parental leave; and
  - (b) return to work after commissioning parental leave.
- (4) Notification in terms of subsection (3) must be given—
- (a) at least one month before a child is expected to be born as a result of a surrogate motherhood agreement; or
  - (b) if it is not reasonably practically to do so, as soon as is reasonably practicable.
- (5) The payment of commissioning parental benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).
- (6) If a surrogate motherhood agreement has two commissioning parents, one of the commissioning parents may apply for commissioning parental leave and the other commissioning parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two commissioning parents.
- (7) In this section, unless the context otherwise indicates—
- “**commissioning parent**” has the meaning assigned to it in section 1 of the Children’s Act, 2005 (Act No. 38 of 2005); and “**surrogate motherhood agreement**” has the meaning assigned to it in section 1 of the Children’s Act, 2005 (Act No. 38 of 2005).”.

**Amendment of section 27 of Act 75 of 1997, as amended by section 4 of Act 11 of 2002**

4. Section 27 of the Basic Conditions of Employment Act, 1997 is hereby amended by the repeal in subsection (2) of paragraph (a).

**Amendment of section 49 of Act 75 of 1997**

5. Section 49 of the Basic Conditions of Employment Act, 1997 is hereby amended by the insertion in subsection (1) after paragraph (d) of the following paragraphs:

- “(dA) reduce an employee’s entitlement to parental leave in terms of section 25A;
- “(dB) reduce an employee’s entitlement to adoption leave in terms of section 25B;
- “(dC) reduce an employee’s entitlement to commissioning parental leave in terms of section 25C;”.

**Amendment of section 83 of Act 75 of 1997, as amended by section 20 of Act 11 of 2002**

6. Section 83 of the Basic Conditions of Employment Act, 1997 is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) The Minister may, on the advice of the Commission and by notice in the *Gazette*, deem any category of persons specified in the notice to be—
  - (a) employees for purposes of the whole or any part of this Act, any other employment law other than the Unemployment Insurance Act, [1966 (Act No. 30 of 1966)] 2001 (Act No. 63 of 2001), or any sectoral determination; or
  - (b) contributors for purposes of the whole or any part of the Unemployment Insurance Act, [1966 (Act No. 30 of 1966)] 2001 (Act No. 63 of 2001).”.

**Amendment of section 12 of Act 63 of 2001, as amended section 4 of Act 32 of 2003**

7. Section 12 of the Unemployment Insurance Act, 2001 is hereby amended by—
  - (a) the insertion in subsection (1) after paragraph (c) of the following paragraph:
    - “(cA) parental benefits as contemplated in Part DA of this Chapter;”and

- (b) the deletion in subsection (1) at the end of paragraph (d) of the word “and” and by the insertion after paragraph (d) of the following paragraph:

“(dA) commissioning parental benefits as contemplated in Part EA of this Chapter; and”.

### **Insertion of Part DA in Act 63 of 2001**

8. The following Part is hereby inserted in the Unemployment Insurance Act, 2001 after section 26:

#### **“Part DA: Parental benefits**

##### **Right to parental benefits**

26A. (1) Subject to section 14, a contributor who is the parent of a child is entitled to the parental benefits contemplated in this Part if the application is made in accordance with the prescribed requirements and the provisions of this Part and if the contributor—

- (a) has been registered as the father of the child in terms of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992);
- (b) is the parent of a child below the age of two in an adoption order referred to in the Children’s Act, 2005 (Act No. 38 of 2005); or
- (c) is the parent of a child who has been born as a result of a surrogate motherhood agreement referred to in the Children’s Act, 2005 (Act No. 38 of 2005);

Provided that the contributor did not claim the adoption benefits referred to in section 27 or the commissioning parental benefits referred to in section 29A in respect of the child.

(2) The entitlement—

- (a) contemplated in subsection (1)(a) and (c) commences on the date of childbirth; or
- (b) contemplated in subsection (1)(b) commences on the day that the court grants the adoption order in terms of the Children’s Act, 2005 (Act No. 38 of 2005).

(3) When taking into account any parental leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the parental benefit may not be more than the remuneration the contributor would have received if the contributor had not been on parental leave.

(4) For purposes of this section the maximum period of parental leave is ten consecutive days.

#### **Application for parental benefits**

26B. (1) An application for parental benefits must be made in the prescribed form at an employment office.

(2) The application must be made within six months after the date of childbirth, but the Commissioner may accept an application after the six month period on good cause shown.

(3) The claims officer must investigate the application and, if necessary, request further information regarding the period the applicant was not working in order to care for the child.

(4) If the application complies with the provisions of this Chapter, the claims officer must—

(a) approve the application;

(b) determine—

(i) the amount of the benefits for purposes of section 13 (3); and

(ii) the benefits the applicant is entitled to in terms of section 13 (4);

(c) authorise the payment of the benefits; and

(d) stipulate how the benefits are to be paid.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

#### **Payment of parental benefits**

26C. The Director-General must pay the parental benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.”.

#### **Amendment of section 27 of Act 63 of 2001, as amended by section 9 of Act 32 of 2003**

9. Section 27 of the Unemployment Insurance Act, 2001 is hereby amended by—

(a) the substitution in subsection (1) for paragraph (a) of the following paragraph:



- “(a) the child has been adopted in terms of the [**Child Care Act, 1983 (Act No. 74 of 1983)**] Children’s Act, 2005 (Act No. 38 of 2005).”;
- (b) the substitution for subsection (2) of the following subsection:
- “(2) The entitlement contemplated in subsection (1) commences on the date that a competent court grants an order for adoption in terms of the [**Child Care Act, 1983 (Act No. 74 of 1983)**] Children’s Act, 2005 (Act No. 38 of 2005).”;
- (c) the substitution for subsection (3) of the following subsection:
- “(3) When taking into account any adoption leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the adoption benefit may not be more than the remuneration the employer would have paid the contributor if the contributor had been at work.” and
- (d) the addition of the following subsection:
- “(4) For purposes of this section the maximum period of adoption leave is ten consecutive weeks.”.

#### **Insertion of Part EA in Act 63 of 2001**

10. The following Part is hereby inserted in the Unemployment Insurance Act, 2001 after section 29:

#### **“Part EA: Commissioning parental benefits**

##### **Right to commissioning parental benefits**

- 29A. (1) Subject to section 14, only one contributor of the commissioning parents is entitled to the commissioning parental benefits contemplated in this Part in respect of each child and only if—
- (a) the child has been born as a result of a surrogate motherhood agreement referred to in the Children’s Act, 2005 (Act No. 38 of 2005);
- (b) the period that the contributor was not working was spent caring for the child; and
- (c) the application is made in accordance with the prescribed requirements and the provisions of this Part.
- (2) The entitlement contemplated in subsection (1) commences on the date of childbirth.
- (3) When taking into account any commissioning parental leave paid to the contributor in terms of any other law or any collective agreement or contract of

employment, the commissioning parental benefit may not be more than the remuneration the contributor would have received if the contributor had not been on commissioning parental leave.

(4) For purposes of this section the maximum period of commissioning parental leave is ten consecutive weeks.

### **Application for commissioning parental benefits**

29B. (1) An application for commissioning parental benefits must be made in the prescribed form at an employment office.

(2) The application must be made within six months after the date of childbirth, but the Commissioner may accept an application after the six month period on good cause shown.

(3) The claims officer must investigate the application and, if necessary, request further information regarding the period the applicant was not working in order to care for the child.

(4) If the application complies with the provisions of this Chapter, the claims officer must—

(a) approve the application;

(b) determine—

(i) the amount of the benefits for purposes of section 13 (3); and

(ii) the benefits the applicant is entitled to in terms of section 13 (4);

(c) authorise the payment of the benefits; and

(d) stipulate how the benefits are to be paid.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

### **Payment of commissioning parental benefits**

29C. The Director-General must pay the commissioning parental benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.”.

**Amendment of section 58 of Act 63 of 2001**

11. Section 58 of the Unemployment Insurance Act, 2001 is hereby amended by the substitution in subsection (12) for paragraph (c) of the following paragraph:

“(c) the number of contributors to whom illness, maternity, parental, **[and]** adoption and commissioning parental benefits, respectively, have been paid and the total amount of such payments; and”.

**Short title**

12. This Act is called the Labour Laws Amendment Act, 2015 and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## **MEMORANDUM ON THE OBJECTIVES OF THE LABOUR LAWS AMENDMENT BILL, 2015**

### **1. BACKGROUND**

- 1.1 This Private Members Bill, ie the Labour Laws Amendment Bill (“the Bill”), was drafted in line with African Christian Democratic Party (“the ACDP”) policy on family values, the Green Paper on Family and as a result of appeals made to the ACDP by fathers who felt strongly that provision should be made in law for “paternity leave”. Fathers play an important role in the upbringing of their children. The ACDP is of the opinion that such a provision would facilitate early bonding between fathers and their children and that stronger and healthier families would be one of the many potential benefits for society as a whole.
- 1.2 The Bill, which deals with parental leave and also provides for adoption and surrogacy leave, is drafted so as to ensure harmony with current legislation and to ensure the provisions contained in the Bill will pass constitutional muster.
- 1.3 It is, however, important to note that the ACDP does not support, nor did it support, amendments to the Children’s Act, 2005 (Act No. 38 of 2005) (“the Children’s Act”) which allowed for same-sex couples to adopt children. It is the view of the ACDP that for the Bill to accomplish its goals it must be applicable in the current legal situation. However, should the Children’s Act be amended in the future to exclude same-sex couples, this legislation would still be applicable.
- 1.4 The Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) (“the Basic Conditions of Employment Act”) provides that an employee may take four months maternity leave in respect of that employee’s child. This maternity leave is paid for by the Unemployment Insurance Fund. It further provides that an employee who is the father of the child may take three days family responsibility leave when that employee’s child is born. The family responsibility leave is paid for by the employer.
- 1.5 Although an employee is entitled to adoption benefits from the Unemployment Insurance Fund, there is no legal obligation on an employer to grant an adoptive parent adoption leave, as the Basic Conditions of Employment Act does not make provision for the granting of adoption leave. Currently, adoption leave is a matter for negotiation between individual employees and employers. This can be seen as a major obstacle in the way of encouraging adoption.
- 1.6 The Unemployment Insurance Act, 2001 (Act No. 63 of 2001) (“the Unemployment Insurance Act”) provides for the payment of maternity and adoption benefits from the Unemployment Insurance Fund.
- 1.7 Neither the Basic Conditions of Employment Act nor the Unemployment Insurance Act makes provision for the taking of leave nor the payment of benefits in a case where an employee has become a parent through a surrogate motherhood agreement referred to in the Children’s Act.

1.8 The Bill seeks to provide for parental leave, adoption leave and commissioning parental leave. It also provides for the payment of parental benefits as well as commissioning parental benefits from the Unemployment Insurance Fund.

## **2. SUMMARY OF THE BILL**

2.1 Clauses 1 to 6 amend the Basic Conditions of Employment Act and clauses 7 to 12 amend the Unemployment Insurance Act.

2.2 Clauses 1 and 2 correct an obsolete reference to an Act.

2.3 Clause 3 provides for the following:

2.3.1 An employee who is a parent and who is not entitled to maternity leave, is entitled to ten consecutive days' parental leave when that employee's child is born or when an adoption order is granted.

2.3.2 An employee who is an adoptive parent of a child who is younger than two years is entitled to adoption leave of two months and two weeks consecutively. If there are two adoptive parents, one of the employees is entitled to adoption leave and the other employee is entitled to parental leave.

2.3.3 An employee who is a commissioning parent in a surrogate motherhood agreement is entitled to commissioning parental leave of two months and two weeks consecutively. If there are two commissioning parents, one of the employees is entitled to commissioning parental leave and the other employee is entitled to parental leave.

2.4 Clause 4 deleted the proviso that an employee may take family responsibility leave when that employee's child is born.

2.5 Clause 5 provides that a collective agreement concluded in a bargaining council may not reduce an employee's entitlement to parental leave, adoption leave or commissioning parental leave.

2.6 Clause 6 corrects an obsolete reference to an Act.

2.7 Clause 7 includes parental benefits and commissioning parental benefits in the list of benefits that a contributor or dependant is entitled to.

2.8 Clause 8 sets out the requirements for the right to parental benefits as well as when the entitlement to parental benefits commences. It further provides for the application for parental benefits and the payment thereof.

2.9 Clause 9 corrects an obsolete reference to an Act.

2.10 Clause 10 sets out the requirements for the right to commissioning parental benefits as well as when the entitlement to commissioning parental benefits commences. It further provides for the application for commissioning parental benefits and the payment thereof.

- 2.11 Clause 11 provides for the inclusion of the parental benefits and commissioning parental benefits in the written report of the Director-General to the Minister.
- 2.12 Clause 12 provides for the short title as well as the commencement date.

### **3. CONSULTATION**

- 3.1 The following bodies were consulted on the Bill:
- a. Nedlac
  - b. Cosatu

### **4. FINANCIAL IMPLICATIONS FOR THE STATE**

There will be financial implications for the State, in particular the Unemployment Insurance Fund, which will be required to pay the new benefits envisaged in the Bill.

### **5. PARLIAMENTARY PROCEDURE**

- 5.1 It is proposed that the Bill be dealt with in terms of the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or section 76 of the Constitution applies.
- 5.2 It is further proposed that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.