Unit 7

Statutory and common law duties of the employer

Learning objectives

At the end of this unit, you should be able to:

- List the statutory and common law duties of the employer
- Define the terms “remuneration”, “basic wage” and “payment in-kind"
- Explain the rules relating to in-kind payments
- Briefly discuss the concept of minimum wages
- Analyse the common law rule of “no work, no pay”
- Calculate the weekly, daily and hourly rate of remuneration and basic wage respectively
- Briefly discuss the time, method and place of payment of remuneration of an employee
- List the deductions that an employer is allowed to make from an employee’s remuneration
- Discuss the duty of an employer to receive and employee into service and the provision of work
- Set out the maximum weekly and daily hours of work for the different categories of employees
- Briefly discuss the law regarding the extension of ordinary working hours and the concept of overtime
- Briefly discuss the minimum conditions pertaining to meal intervals, night work, daily spread-over, weekly intervals and work on Sundays and public holidays
- Discuss the minimum conditions pertaining to annual leave, sick leave, compassionate leave and maternity leave
- Compare the rules that apply to employees living on agricultural land, domestic workers and other employees in respect of the provision of accommodation
- Briefly discuss the employer’s duty to provide safe working conditions to employees
- Give a brief overview of the main miscellaneous duties of an employer
- Apply the contents of this unit to solve problems
1. INTRODUCTION

As discussed in Unit 6 of this guide, a number of implied terms form part of the contract of employment, imposing duties on the parties, even if they have not expressly agreed to them. Prior to the conclusion of a contract of employment, the parties have no rights to enforce against each other; however, there are certain statutory exceptions to this rule. For both the purposes of Section 5 (Prohibition of discrimination and sexual harassment in the workplace) of the Labour Act and the Affirmative Action (Employment) Act 29 of 1998 the employer's duty is extended to an applicant for employment.

Chapter 3 [Basic Conditions of Employment] of the Labour Act is of considerable importance since it sets minimum standards for the protection of employees. Employees represented by a trade union may negotiate additional and/or more favourable terms and conditions of service which are contained in collective agreements. As mentioned earlier, disregard for the weaker position of the individual employee gives
rise to a situation where the common law does not provide much protection regarding, among others, hours of work, meal intervals, leave and termination of employment. The Labour Act creates minimum conditions of employment which the parties are not allowed to ignore, even if both are willing to do so. The minimum (or basic) statutory conditions protect employees against exploitation, since they are not on an equal footing with the employer, especially when a new applicant for employment is negotiating an employment contract. As stated before, the parties may always agree to better terms and conditions of employment in either the contract of employment or in a collective agreement.

As explained in Unit 6 of this guide, it is lawful for the parties to change the common law duties of the respective parties, provided that it is within the limits of the law and not against good morals.

The statutory duties of the employer, included in the discussion below, are the absolute minimum obligations imposed upon the employer. It is, however, important to note that the duties set out below are not the only statutory duties imposed upon an employer from a labour perspective, as other relevant legislation such as the Social Security Act, Affirmative Action (Employment) Act, Employees’ Compensation Act and the Employment Services Act 8 of 2011 impose additional obligations.

2. PAYMENT OF REMUNERATION

| Section 1: Labour Act: Definitions and interpretations – definitions of “lockout”, “remuneration” and “strike” |
| Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definitions of “basic wage” and “monetary remuneration” |
| Section 8(2): Labour Act: Definitions relating to basic conditions of employment |
| Section 13: Labour Act: Wage Order |
| Section 14: Labour Act: Exemptions from a wage order |
| Regulation 2: Labour General Regulations: Labour Act: Portion of basic wage that may be paid in-kind and calculation of in-kind payments |
The employer’s most important duty is to pay the employee a salary or wage strictly and punctually in terms of the agreement. Both in terms of common law and the Labour Act, remuneration may consist partly in cash and partly in kind.

The remuneration is determined in the contract by the parties themselves. If the contract makes no provision for the payment of remuneration and there is no method to calculate a wage, the Court may either hold that there is no contract of employment or that the employer is bound to pay a ‘reasonable wage’. A ‘reasonable wage’ will depend on circumstances such as custom and practice in the workplace and/or industry concerned, the type of service and the location of the employment.

2.1 Definitions

♦ **Remuneration** means the “total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee;” The remuneration of an employee thus includes everything the employee receives in return for services rendered.

♦ **Monetary remuneration** is “that part of the remuneration that is paid in money.

♦ **Basic wage** means the monetary remuneration part of the remuneration plus the cash equivalent of **payment in-kind**, but excludes allowances such as travel and subsistence, housing, motor vehicle, transport, and professional allowances; pay for overtime, additional pay for work on a Sunday and/or public holiday; additional pay for night work or payments in respect of pension, annuity or medical benefits or insurance.

♦ **Payment in-kind** means payment in the form of goods or services instead of money, for example, a crate of beer or soft drink every week. It is important to note that an employer may not pay an employee an in-kind payment except by agreement or in terms of a collective agreement\(^1\). Furthermore, the cash equivalent of the in-kind payment may not exceed one-third of the employee’s basic wage. The value of the in-kind payment is based on the producer’s price of the commodities comprising the in-kind payment or if there is no producer’s price available, the average price of the commodity at agricultural cooperatives or wholesalers in the nearest city or town\(^2\).

\(^1\) Section 8(2): Definitions relating to basic conditions of employment: Labour Act.

\(^2\) See regulation 2 on page 2 of the Labour General Regulations: Labour Act
2.2 Minimum wages

There is a common misconception that the Labour Act lays down minimum wages; however, neither the common law nor the Labour Act prescribes any minimum wages.

The Labour Act does, though, provide for the establishment of a Wages Commission\(^3\), which reports to the Minister for the purposes of making a wage order in terms of Section 13 of the Labour Act, determining remuneration and other conditions of employment for employees in any industry and area. The Minister may, upon application, exempt any person or category of persons from any provision of a wage order, provided that the Minister is satisfied that either the terms and conditions of employment of the employees affected by the exemption are not less favourable than those contained in the wage order, or special circumstances exist that justify the exemption in the interest of the affected employees.

Recently, the Minister issued a wage order in terms of Section 13\(^4\) for minimum wages and supplementary minimum conditions of employment\(^5\) for domestic workers.

A minimum wage can also be established in terms of a collective agreement and will supersede a wage order if the terms contained in the collective agreement are more favourable. Until date, minimum wages have been determined by means of a collective agreement (which terms were extended to the whole industry) for the agricultural sector\(^6\), the construction industry\(^7\) as well as the security industry\(^8\) respectively.

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\(^3\) Sections 105-114 of the Labour Act.

\(^4\) GN 257 (Regulations in terms of section 135 of the Labour Act) & 258 (Wage order in terms of Section 13 of the Labour Act), published in GG No. 5638 dated 24 December 2014. This wage order does not apply to domestic workers covered by any collective agreement in the agricultural sector.

\(^5\) Such as the payment of a transport allowance to a live-out worker; the provision of food to an employee who qualifies for a meal interval in terms of the Labour Act; the provision of free accommodation (complying with prescribed requirements) to a live-in worker; the provision of a uniform and personal protective clothing, without charge and the requirement of concluding a written contract (as prescribed).

\(^6\) The collective agreement applicable to the agricultural sector also regulates the conditions of accommodation and provisions concerning the food requirements of live-in employees and their dependants.

\(^7\) The collective agreement applicable to the construction industry also regulates aspects such as the provision of minimum protective clothing and equipment; minimum productivity levels; performance standards; living away allowances; payment of a service allowance (similar to a bonus); training of workplace union representatives; matters regulating the re-employment of retrenched employees and provision of pension fund benefits.

\(^8\) The collective agreement applicable to the security industry also regulates the provision of a uniform to employees.
2.3 No work, no pay principle

The employee is only entitled to receive remuneration for work actually done in terms of the common law rule of ‘no work, no pay’. Thus, in terms of the common law, if an employee is not able to work because of illness, the employer does not have to pay the employee any remuneration. This rule, however, has been changed by the Labour Act by providing for a variety of leave periods with payment. The “no work, no pay” rule also does not apply in a situation where the employee exercises his or her right to leave a dangerous place of work\(^9\). As a general rule, an employee who had been suspended from work is also entitled to remuneration.\(^{10}\)

The converse also applies, i.e. ‘no pay, no work’. Employees may refuse to work if their employer fails to pay them and will thus not be in breach of contract or be deemed to be on strike. A strike and lockout are regarded as non-performance as far as remuneration is concerned\(^{11}\).

Although the remuneration of employees is usually based on hours of work, employees are entitled to remuneration when they have made their services available to the employer, whether or not the employer utilised such work/skills. There is no prohibition against the inclusion of a “no work, no pay rule” clause in a particular agreement; it is practice to include it where the business operations necessitate such a term as an exception to the rule.

Reasonable remuneration for services rendered is based on the principle of unjust enrichment\(^{12}\), as the employer benefited by the work done and should accordingly remunerate the employee in return. This rule, strangely enough, does not apply in a situation where the employee absconded or abandoned the job before completion. In the latter situation, the employee is not entitled to claim remuneration for the partial performance already rendered.

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\(^9\) See discussion below on safe working conditions.
\(^{10}\) The exceptions to this rule are discussed in Unit 9 of this guide.
\(^{11}\) See section 76(1) of the Labour Act.
\(^{12}\) A claim for a *quantum meruit* is reasonable remuneration for services rendered.
2.4 Calculation of hourly, daily, weekly or monthly rate of remuneration and basic wages

Section 10: Labour Act: Calculation of remuneration and basic wages

It may become necessary to calculate an employee’s hourly, daily, weekly or monthly rate of remuneration, primarily for the purposes of the calculation of payment due for overtime, night work, work performed on Sundays and public holidays and leave credit upon termination of employment. Most employees receive their remuneration at the end of a specified interval, which means that they are remunerated on the basis of time worked. There are, however, employees who are remunerated on a different basis, which is not directly related to actual hours of work. The method of calculation of the weekly, daily and hourly rate of payment of these two groups of employees is explained below. (You will note that the method of calculation is the same for both the purposes of remuneration and basic wage.)

♦ Employees who are remunerated on the basis of time worked

Please refer to Table 1 on page 22 of the Labour Act and the example below for the method of calculation of the weekly, daily and hourly remuneration and basic wages of employees who are remunerated on this basis.

**CALCULATION OF DAILY, WEEKLY AND HOURLY REMUNERATION/BASIC WAGE**

Johnny works for ABC Co. 5 days a week, 8 hrs a day and earns a basic salary of N$ 5000 per month. In addition hereto he receives the following allowances: Transport allowance of N$ 500; Housing allowance of N$ 1000; Contributions by the employer to a pension fund of N$ 500.

**Remuneration:**

**Weekly remuneration:** Monthly remuneration divided by 4.333, i.e. N$ 7000 ÷ 4.333 = N$ 1615.51

**Daily remuneration:** Weekly remuneration divided by number of days per week e/e works, i.e. N$ 1615.51 ÷ 5 = N$ 323.10

**Hourly remuneration:** Daily remuneration divided by number of hrs e/e works per day, i.e. N$ 323.10 ÷ 8 = N$ 40.39
### Basic wage:

**Weekly basic wage:** Monthly basic wage divided by 4.333, i.e. N$ 5000 ÷ 4.333 = N$ 1153.93

**Daily basic wage:** Weekly basic wage divided by number of days per week e/e works, i.e. N$ 1153.93 ÷ 5 = N$ 230.80

**Hourly basic wage:** Daily basic wage divided by number of hrs e/e works per day, i.e. N$ 230.80 ÷ 8 = N$ 28.85

♦ **Employees who are remunerated on a basis other than time worked**

In these instances, the remuneration must be converted to a weekly remuneration in order to calculate the daily and/or hourly rate of remuneration or basic wage.

In order to calculate the average weekly remuneration or basic wage of such an employee, the total amount of remuneration earned over a period of the immediately preceding 13 (thirteen) weeks of work or the shorter period of work, if applicable, must be divided by the total number of weeks the employee worked. Once the weekly amount is available, the method of calculation of the daily and hourly rate will be the same as above.

### 2.5 Time, method and place of payment of remuneration

#### Section 11: Labour Act: Payment of remuneration

**Regulation 3:** Labour General Regulations: Labour Act: Written statement of particulars of monetary remuneration

**Annexure 1:** Annexure to Labour General Regulations: Labour Act

**Particulars of monetary compensation**

If the time, method and/or place of payment have not been stipulated in the contract or in a collective agreement or if the provisions are less favourable than what are provided in the minimum conditions laid down, section 11 of the Labour Act shall apply.
In terms of section 11, the employer is obliged to pay any remuneration (both in money and in kind\textsuperscript{13}) not later than one hour after completion of the ordinary hours of work on a normal pay day. The monetary part of the remuneration must be paid in cash or, at the employee’s option, by cheque to the employee personally or by direct deposit into an account designated in writing by the employee. Payment of remuneration must always be accompanied by a written statement, which must contain certain prescribed particulars\textsuperscript{14}, given to the employee in a sealed envelope.

The employee may not be paid in a shop, bottle store or other place where intoxicating liquor is sold or stored or in any place of amusement, unless the employee is employed in that shop, bottle store or place.

2.6 Restrictions on deductions from remuneration

Section 12: Labour Act: Deductions and other acts concerning remuneration

The provisions of section 12 restrict an employer to make deductions from an employee’s remuneration, as follows:

- **Automatically allowed deductions**

  Any amount required or permitted in terms of a court order\textsuperscript{15}, or any law\textsuperscript{16}.

- **Total of deductions listed below may not exceed one-third of the remuneration**

  - Required or permitted in terms of a collective agreement or an arbitration award;

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\textsuperscript{13} The employee may request the employer to make the payment in kind portion at a different time than stipulated. See section 11(4) of the Labour Act.

\textsuperscript{14} Please refer to Annexure 1: Annexure to Labour General Regulations on p. 9-10.

\textsuperscript{15} For example, an Emoluments Attachment – or Garnishee Order, i.e. a court order obliging the employer to deduct a stipulated amount and pay it over to a specified third party. This situation may arise where an employee did not settle his or her debt and the creditor opted to collect the outstanding debt in this way.

\textsuperscript{16} Examples are Income Tax payable to the Receiver of Revenue or Social Security Fund contributions.
If the employee agreed thereto in writing and it concerns a payment in respect of any one or more of the following:

- Rent in respect of accommodation supplied by the employer;
- Goods sold by the employer;
- A loan advanced by the employer;
- Contributions to employee benefit funds;
- Subscriptions or levies payable to a registered trade union

♦ Deductions of value of in-kind payments or contributions due to domestic workers

An employer may not deduct the value of in-kind payments or contributions such as food, clothing or housing from the basic wage of a domestic worker.17

2.7 Other prohibitions

♦ Levying of a fine

An employer is not allowed to levy a fine on an employee unless it is authorised by statute or a collective agreement.

♦ Purchasing goods from the employer

An employer is not allowed to require an employee to buy goods from a shop owned by the employer or run on his/her/its behalf or use the services rendered by the employer for reward. In case an employee is allowed to buy goods supplied by the employer, the employer may not charge more than the price paid by the employer for the goods plus any reasonable costs incurred in acquiring the goods.

♦ Reduction of working hours and remuneration

An employer is allowed, by written notice to the employee, to reduce an employee’s agreed number of hours of work for a maximum period of three months for operational reasons or other reasons recognised by law and at the same time reduce the employee’s remuneration. The remuneration may not be reduced by more than one-half of that employee’s basic wage, unless

allowed in terms of the contract of employment or a collective agreement.

Such reduction of working hours may be extended for additional periods of not longer than three months, by written agreement between the employer and employee or the employee’s registered trade union, in the case of an exclusive bargaining agent.

3. **DUTY TO RECEIVE EMPLOYEE INTO SERVICE AND THE PROVISION OF WORK**

The employer is obliged to **receive the employee into service**, i.e. allowing the employee to enter the workplace and to work. If not, it is regarded as a serious breach of the employment contract. There are, however, some lawful exceptions to this rule, for example, suspension and the lawful lockout of employees. The suspension of an employee suspected of some form of serious misconduct while the matter is being investigated means that the employer is preventing the employee to work and thus, the employer must still pay the employee the agreed remuneration, unless certain exceptions apply. A situation where the employer wants to deny its employees access to the workplace or otherwise prevent them from working to induce them to accept an offer or proposal in the process of collective bargaining, is known as a “lockout”; the employer’s corresponding right of the employees’ right to strike.

Under common law, the general rule is that the employer has no duty to **provide the employee with tasks to perform**, provided that the employer pays the employee the agreed remuneration.

There are a few exceptions to this rule, namely where:

- The employee’s wage depends on the work provided by the employer, for example where the employee is remunerated on a commission basis or a share in the profits; or

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18 See further discussion on suspension in Unit 9 below.
♦ A person’s earning capacity is influenced by the publicity s/he gets from working, for example an actor or actress; or

♦ The failure to provide work degrades his or her status; or

♦ The employee requires the work in order to maintain or develop skills, for instance where the employer undertook to instruct and train the employee in the course of his/her employment

4. OBSERVE PRESCRIBED HOURS OF WORK

The common law allows the parties to freely regulate the working hours. If their agreement makes no specific provision for the hours of work, the practice and custom of the specific industry, alternatively, the Labour Act shall apply.

4.1 Maximum daily and weekly hours of work

Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definitions of “security officer” & “week”
Section 16: Labour Act: Ordinary hours of work

An employer must not require an employee, except security officers; employees working in emergency healthcare services or employees in a class designated by the Minister, to work more than 45 (forty-five) hours in any week. If an employee works five days or less per week, the maximum number of hours of work allowed per day is 9 (nine). If an employee works for more than five days in a week, the maximum hours per day is 8 (eight). For the purposes of the calculation of time worked by these employees, any meal interval shall be excluded.

In the case of security officers, employees working in emergency healthcare services and those employees in a class designated by the Minister, the maximum weekly hours is 60 (sixty). If such an employee works five days or less per week, the maximum prescribed hours per day is 12 (twelve), while the employee who works for more than five days per week, can be expected to work a maximum of 10 (ten) hours per day. In the case of these employees, any meal interval shall be regarded as time worked for the purposes of determining the time worked.
4.2 Extension of working hours

The mentioned ordinary hours of work may be extended if the employee’s duties include serving members of the public. In the latter instance, the employee may be expected to work a maximum of 15 minutes extra per day, subject to a maximum of 60 minutes in a week, after the completion of the ordinary hours of work to enable the employee to continue serving members of the public.

4.3 Continuous shifts

Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definition of “continuous shift”
Section 15: Labour Act: Declaration of continuous shifts
Section 16: Labour Act: Ordinary hours of work

The Minister may declare any operation to be a continuous operation and permit the working of continuous shifts in respect of those operations. The Minister may further prescribe any condition in respect of the shift, including the working hours; however, it may never exceed eight hours per shift.

4.4 Overtime

Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definition of “overtime” & “urgent work”
Section 17: Labour Act: Overtime

“Overtime” means time worked in excess of the hours an employee ordinarily works on any ordinary day, but excludes any work done on a:
- Sunday, if it is not an ordinary working day for that employee; or
- Public holiday.
Overtime work is only done by agreement between the parties, unless the employee is performing urgent work. Thus, if the employee agreed in the contract of employment to work overtime if and when required, the employee is not entitled to refuse if the need for overtime work arises at a later stage.

The maximum allowable overtime is 3 (three) hours per day and 10 (ten) hours per week. If the employee agrees, the employer may apply in writing to the Permanent Secretary to increase these limits on overtime work. Overtime worked on any day except on a Sunday or public holiday must be paid at a rate of one and a half times the employee’s hourly basic wage for every hour worked, while an employee who ordinarily works on a Sunday or public holiday and works overtime on such a day, must be remunerated at a rate of double the employee’s hourly basic wage for every hour worked.

These provisions, except where it relates to payment of overtime, do not apply to an employee who is performing “urgent work”. Urgent work is defined as:

- Emergency work which, if not attended to immediately, could cause harm to or endanger the life, personal safety or health of any person or could cause serious damage to or destruction of property; or
- Work connected with the arrival, departure, loading, unloading, provisioning, fuelling or maintenance of a ship, aircraft, truck or other heavy vehicle used to transport passengers, livestock or perishable goods.

### 4.5 Meal intervals

An employee is entitled to a meal interval of at least one hour after continuous work of five hours, unless shortened by agreement with the employee (may not be shortened to less than 30 (thirty) minutes) and written notice to the Permanent Secretary of such an agreement. The employer may not require an employee to work during a meal interval. The law specifically provides that a driver of a motor vehicle who is just remaining in charge of the vehicle or its load during a meal interval is not
regarded as to be working during the interval. These rules do not apply to a security officer; an employee who is engaged in urgent work or an employee who works in a continuous shift.

4.6 Night work

Section 19: Labour Act: Night work

Special provision is made for “night work”, i.e. any work performed between the hours of 20h00 and 07h00. An employee is entitled to an additional payment of 6 (six) percent of that employee’s hourly basic wage for any work performed between the hours of 20h00 and 07h00.

A pregnant woman is not allowed to perform any night work during the period of eight weeks before her expected date of confinement or eight weeks after her confinement. These periods may be extended if a medical practitioner certifies that it is necessary for the health of the employee or her child.

Unless regulated otherwise, a child under the age of 18 (eighteen) years may also not perform night work.

4.7 Daily spread-over and weekly rest periods

Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definitions of “spread-over” & “weekly interval”

Section 20: Labour Act: Daily spread-over and weekly rest periods

An employer may not require or permit an employee to work a spread-over of more than 12 (twelve) hours. A spread-over is defined as the period from the time an employee first starts work in any 24 hour-cycle to the time the employee finally stops working in that cycle.
An employee is entitled to a **weekly interval** of at least 36 (thirty-six) **consecutive hours**. A weekly interval is defined as the interval between the end of one ordinary working week and the start of the next.

The provisions regarding the daily spread-over and weekly intervals do not apply to an employee who is performing urgent work.

**SPREAD-OVER**

An employee starts work in the morning at 08h00 and works until 13h00 when he is allowed to go home until 19h00, when another work period commences and ends at 22h00 that evening. The spread-over in this instance amounts to 14 hrs, which is in conflict with maximum period allowed in terms of the Labour Act, i.e. 12 hrs. Note that a spread-over does not mean the employee is actually working during that period.

### 4.8 Work on Sundays and public holidays

**Section 21: Labour Act: Work on Sundays**  
**Section 22: Labour Act: Public holidays**

#### 4.8.1 Employees who may be expected to work on Sundays and public holidays

An employer may not require or permit an employee to perform work on a Sunday or public holiday, unless:

- The **employee agreed** thereto and the employer applied in writing to the **Permanent Secretary to approve** such work on a Sunday and/or public holiday and such activity was subsequently approved by the Permanent Secretary; or

- The employee is employed for the purposes of:
  - Urgent work;
  - Carrying on the business of a shop, hotel, boarding house or hostel that lawfully operates on a Sunday or public holiday;
  - Performing domestic service in a private household (domestic worker);
4.8.2 Payment for work performed on Sundays

An employee who does not normally work on a Sunday may agree to receive payment at a rate of one and a half of the hourly basic wages for each hour worked plus an equal period of time away from work during the next working week. If not agreed otherwise, such an employee must receive double the hourly basic wage for each hour worked.

An employee who normally works on a Sunday must receive his or her daily remuneration plus the hourly basic wage for each hour worked.

4.8.3 Payment for work performed on public holidays

♦ If a public holiday falls on a day on which an employee would ordinarily have worked (for example, a Wednesday, which is an ordinary working day for most people), but such employee does not work on the said day (due to the fact that it is a public holiday), the employee must still receive his or her remuneration for that day. However, if such employee failed to work, without a valid reason, on either the day immediately before or the day after the public holiday, the employer is entitled to deduct the remuneration payable for both the public holiday and the day(s) of absence without a valid reason.

♦ In the case of an employee who ordinarily works on a public holiday, the employee must receive his or her daily remuneration plus the hourly basic wage for each hour worked, unless the employer agrees (upon request of the employee) to pay the employee his or her daily remuneration plus one half of the hourly basic wage for each hour worked and an equal period of time away from work during the next working week.

♦ In the case of an employee who works on a public holiday that falls on a day which is not an ordinary work day for that employee, the employee must receive double his or her hourly basic wage for each hour worked on the said public holiday.
The table below summarises the (minimum) stipulations for payment for work performed on Sundays and public holidays respectively.

Table 1

<table>
<thead>
<tr>
<th>Type of employee</th>
<th>Sunday</th>
<th>Public holiday</th>
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</thead>
<tbody>
<tr>
<td>Not normal work day</td>
<td>Double hourly basic wage or 1 ½ hourly basic wage plus equal period of time away from work during next working week, if agreed.</td>
<td>Double hourly basic wage for each hour worked.</td>
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<tr>
<td>Normal work day</td>
<td>Daily remuneration plus hourly basic wage for every hr worked.</td>
<td>Daily remuneration plus hourly basic wage for every hr worked; or daily remuneration plus ½ of hourly basic wage plus equal period of time away from work during next working week, if agreed.</td>
</tr>
</tbody>
</table>

4.8.4 Work done partly on a Sunday or public holiday

For the purposes of the calculation of payment for work performed partly on a Sunday or public holiday and partly on any other day, the law provides that all the hours of the shift are deemed to have been worked on the day on which the majority of hours of the shift fall. This means that if the majority of the hours worked on a shift extends into or begin on a Sunday or public holiday, all the hours of that shift are deemed to have been worked on that Sunday or public holiday and the rules of payment on that specific day shall apply, and vice versa.

5. PROVIDE LEAVE

5.1 Annual leave

Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definitions of “annual leave cycle”

Section 23: Labour Act: Annual leave
Every employee is entitled to at least **four consecutive weeks**’ annual leave, i.e. after a period of 12 (twelve) consecutive months’ employment, with **full remuneration.** The leave period depends on the number of days an employee works in an ordinary work week. The table below shows the method of calculation\(^\text{19}\). You will note that the number of days worked per week is multiplied by 4 in each instance.

### Table 2

<table>
<thead>
<tr>
<th>Number of days in ordinary work week</th>
<th>Annual leave entitlement in working days</th>
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<tbody>
<tr>
<td>6</td>
<td>24</td>
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<tr>
<td>5</td>
<td>20</td>
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<td>4</td>
<td>16</td>
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<td>12</td>
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<td>8</td>
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<td>4</td>
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</table>

An ordinary work week is defined as the number of days an employee ordinarily works per week. In a situation where an employee does not ordinarily work a fixed number of days per week, the annual leave is calculated on the average number of days worked per week over a period of 12 (twelve) months prior to the commencement of a new annual leave cycle, multiplied by four.

### CALCULATION: NO FIXED NUMBER OF WORKING DAYS PER WEEK

If an employee worked 4 days and 2 days respectively every alternative week for the past 12 (twelve) months, s/he does not work a fixed number of days per week. Therefore, on average, this employee worked 3 days per week. The employee will thus be entitled to 12 working days of annual leave.

The number of days of annual leave may be reduced by the number of days during the annual leave cycle which, on request of the employee, the employer granted to the employee **occasional leave** on full remuneration. If a public holiday falls on an ordinary working day during an employee’s annual leave period, the employer must grant the employee an additional day of paid leave for that day.

The employer may determine **when** annual is to be taken, provided that it must be granted not later than four months after the end of the annual leave cycle, or, if the employee agrees in writing, this four months period may be extended to a maximum of six months. An employer is further not allowed to require or permit an employee to take annual leave during sick leave, compassionate leave or maternity leave periods.

\(^{19}\) Section 23(2) of the Labour Act.
Remuneration for the annual leave period is payable according to the employee's regular pay schedule if paid by direct deposit. In any other case it is payable not later than the last working day before the commencement of the annual leave or, if the employee requests such extension in writing, not later than the first pay day after the end of the leave period.

Irrespective of whether or not an employee requests or agrees thereto in writing, an employer is not allowed to pay an employee an amount of money in substitution of annual leave to which an employee is entitled, except for payment of leave due upon termination of employment, subject to certain provisions. The detail of these provisions will be discussed in the Labour Law 1B guide as part of the discussion on termination of employment.

If a domestic worker accompanies his or her employer on vacation for the purposes of rendering services to the household, the time spent rendering those services must be treated as working time during which the provisions of the Labour Act and the Wage Order shall still apply.\(^\text{20}\)

5.2 Sick leave

<table>
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<th>“medical practitioner”</th>
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Section 1: Labour Act: Definitions and interpretations – definition of “medical practitioner”
Section 8(1): Labour Act: Definitions relating to basic conditions of employment – definitions of “incapacity”, “sick leave” & “sick leave cycle”
Section 24: Labour Act: Sick leave

“Sick leave” is defined as any period during which an employee is unable to work due to incapacity, while “incapacity” is again defined as an inability to work owing to any sickness or injury.

An employee who ordinarily works 5 (five) days during a week, is entitled to a minimum of 30 (thirty) working days of sick leave in a period of 36 (thirty-six) months of employment (also referred to as the sick leave cycle), while an employee who ordinarily works 6 (six) days per week is

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entitled to 36 (thirty-six) working days during the same cycle. The sick leave entitlement of an employee who works less than 5 (five) days per week, will be calculated on a pro rata basis. During the first year of employment an employee is entitled to one day’s sick leave for every 26 days worked. As in the case of annual leave, if an employee does not work a fixed number of days per week, the average number of days worked per week must be calculated over the previous 12 (twelve) months.

Any sick leave period is fully remunerated, unless one or more of the following exceptions apply:

♦ If the employee has been absent from work for more than two consecutive days and failed to produce a medical certificate by a medical practitioner or any other evidence of proof of illness as may be prescribed;

♦ The balance, if any, if the employee receives (or is entitled to receive) sick leave payment from one or more of the following sources:
  o In terms of the Employees’ Compensation Act 30 of 1941\(^{21}\);
  o From a fund or organisation designated by the employee and to which the employer makes contributions of at least equal of that of the employee;
  o In terms of any other legislation.

Sick leave not used during the sick leave cycle lapses at the end of the sick leave cycle and does not entitle the employee to any additional remuneration upon termination of employment.

5.3 Compassionate leave

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\(^{21}\) The objective of the Employees’ Compensation Act is to compensate employees for disablement caused by work related accidents or diseases contracted out of, and in the course of their employment or for death resulting from such accidents and diseases. Only certain employees are covered by the Accident Fund established in terms of the said legislation. The provisions of the aforesaid Act will be discussed in more detail in the Labour Law 1B guide.
An employee is entitled to 5 (five) working days compassionate leave during each period of 12 (twelve) months of continuous employment with full remuneration. In order to qualify for compassionate leave there must be a death or serious illness in the family. The concept “serious illness” is not defined in the Labour Act, but please note of the definition of “family” in terms of the Labour Act, as augmented by the definition of a “spouse”.

**Family** means a:

- ♦ Child (including a child adopted in terms of any law, custom or tradition);
- ♦ Spouse (defined as a partner in a civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom); or
- ♦ Parent, grandparent, brother or sister of the employee; or
- ♦ Father-in-law or mother-in-law of the employee

Similar to sick leave, if not used, customary law lapses at the end of the period and the employee will also not be entitled to any additional remuneration on termination of employment.

### 5.4 Maternity leave

In order to qualify for maternity leave, a female employee must have completed 6 (six) months of continuous service in the employment of an employer. She is entitled to at least 12 (twelve) weeks of maternity leave, i.e. 4 (four) weeks before her expected date of confinement, as certified by a medical practitioner, until her actual date of confinement and a further period of 8 (eight) weeks after her actual date of confinement. In the event that the confinement occurred less than four weeks after the

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22 Section 25(5)
23 Section 1
24 “Medical practitioner” (Section 1: Definitions and interpretations: Labour Act) includes not only a person registered as such in terms of the Medical and Dental Professions Act 10 of 2004, but also a person who is registered as a nurse or midwife in terms of the Nursing Act 8 of 2004.
commencement of her maternity leave, the law provides that she is entitled to additional time after the actual date of confinement in order to bring her total maternity leave period up to 12 weeks.

If a medical practitioner certifies that, due to complications arising from pregnancy, birth or congenital conditions, it is necessary for the health of the employee or the employee’s child, the employer must grant the employee **extended maternity leave** of up to a maximum equal to the greater of one month or the amount of accrued sick leave that the employee has available at that time. In essence, if it is necessary for the employee’s health, an extended maternity leave period of at least one month is available, to be taken either before or after the ordinary maternity leave period. The period of extended maternity leave must run immediately before or after the ordinary maternity leave period.

During the period of maternity leave, the provisions of the contract of employment shall remain in force and the employee is entitled to the remuneration payable except the basic wage. In essence, this means that the employer will continue to pay all allowances such as housing, motor vehicle, transport, professional allowances and payments in respect of pension, annuity and medical benefits or insurance. The employee will be entitled to claim such portion of the basic wage, as may be prescribed in terms of the Social Security Act 34 of 1994, from the Social Security Commission.

Section 26 of the Labour Act also provides **job security** to an employee during the period that she is on maternity leave. An employer is not allowed to dismiss such an employee either during her maternity leave or at the expiry of such leave for reasons of collective termination or redundancy or on any grounds arising from her pregnancy, delivery, or her resulting family status or responsibility, unless the employer has offered the employee comparable alternative employment and she has unreasonably refused to accept that offer.
6. PROVIDE ACCOMMODATION

Section 28: Labour Act: Provision of accommodation

6.1 General

If it is required from an employee to live at the place of employment or to reside on any premises owned or leased by the employer, the employer is obliged to provide the employee with adequate housing, sanitary and water facilities.

6.2 Employees living on agricultural land

If such an employee lives on agricultural land, the duty (as set out in 6.1 above) is extended to the employee’s dependants. If available, electricity must also be supplied. A "dependant" is defined as the spouse and dependant children of the employee or of the spouse.

6.3 Live-in domestic workers

When a domestic worker is required to live at the place of employment, the employer must provide living quarters, without charge, to the worker with minimum conditions such as a lockable room with a key, good ventilation, electricity (if available to the household), a bed and mattress, heat (if available in the household) and access to clean drinking water, toilet and bathing facilities.

The employee is entitled to receive visitors upon reasonable notice and at reasonable intervals or hours, in consultation with the employer.

6.4 Notice to vacate the premises

If the employer terminates the contract of employment of an employee who is required to live at the place of employment, the employer is obliged

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25 In terms of a collective agreement applicable to the agricultural sector.
to give the employee 3 (three) months’ written notice to vacate if it is agricultural land and at least 1 (one) month’s notice in the case of all other employees.

In a situation where the employee referred a dispute alleging unfair dismissal to the Labour Commissioner within 30 (thirty) days following the termination of employment, the employer is not allowed to require the employee to vacate the premises until the dispute is resolved or disposed of.

7. PROVIDE SAFE WORKING CONDITIONS

Section 1: Labour Act: Definitions and interpretations – definition of “premises”
Section 39: Labour Act: Employer duties to employees
Section 40: Labour Act: Employer’s duties to persons other than employees
Section 43: Labour Act: Election of health and safety representatives
Section 44: Labour Act: Rights and powers of a health and safety representative
Section 45: Labour Act: Duties to provide information
GN No. 156 Labour Act 6 of 1992: Regulations relating to the health and safety of employees at work (published in GG 1617, dated 1 August 1997)

7.1 General

In terms of the common law, employers are obliged to provide their employees with reasonably safe and healthy working conditions. This duty is now regulated in terms of Chapter 4 [Health, safety and welfare of employees] of the Labour Act, imposing certain specified duties upon both employers and employees. The duties of the employer, or person in charge of premises where employees are employed, include the duty (without any charge to the employees) to:

♦ Provide a working environment that is safe; without risk to the health of the employees and has adequate facilities and arrangements for the welfare of the employees;
♦ Ensure that the organisation of work does not adversely affect the safety or health of employees;
♦ Take any prescribed steps to ensure the safety, health and welfare of employees at work;
♦ Provide and maintain plant, machinery, systems and processes of work that are safe and without risk to the health of employees;
♦ Provide employees with adequate personal protective clothing and equipment if reasonably necessary;
♦ Provide employees with the necessary information, instructions, training and supervision to work safely and without a risk to their health;
♦ Provide and maintain safe entry to and exit from places of work;
♦ Ensure that the use, handling, storage or transport of articles or substances is safe and without any risk to the health of employees;

The employer has to report to a labour inspector whenever there is an accident or prescribed disease contracted at any place where the employer’s employees work.

If an accident occurred at the workplace and an employee is injured, the necessary forms should also be completed in line with the requirements of the Social Security Commission by the employer and the medical practitioner treating the employee.

### 7.2 When will an employee be entitled to claim compensation from the employer?

Should failure to ensure the safety and health of the employee lead to injury, the contracting of a disease or death, the employer may be held delictually liable. Before the employee (or his or her family) will be able to claim compensation from the employer, the following will have to be proved:

♦ The employer or somebody else for whose conduct the employer is liable (vicarious liability) must have committed an act or failed to act (an omission); and

♦ The act or omission must be unlawful; and

♦ The act or omission must be the cause of the personal injury or damage; and

♦ Damage or personal injury must in fact have resulted.

At present, the Employees’ Compensation Act 30 of 1941 (as amended) provides compensation payable to certain employees (or their families), as prescribed, who get injured, contract a disease or die in the course of their
duties. If this Act is applicable to a particular employee, claims are not instituted against the employer personally. The Employees’ Compensation Act will be discussed in more detail in the Labour Law 1B guide.

7.3 The employee’s right to leave an unsafe and/or unhealthy workplace

If an employee has reasonable cause to believe that it is neither safe nor healthy to continue working, the employee may leave that place until effective measures have been taken. However, the employee must immediately inform the employer of such belief and the basis thereof. In such circumstances, the employee is still entitled to the same conditions of service and to receive the same remuneration during the period of absence.

The doctrine of *volenti non fit iniuria*

27 shall apply in a situation where the employee has knowledge of a hazardous state of affairs and realises the nature thereof, but still subjects him- or herself voluntarily to this hazard. It is regarded as if the employee consented to any harm that might befall him or her and the employer could thus not be held liable in these circumstances.

7.4 Duty to provide information to health and safety representatives

If there are more than 10 (ten) employees in a workplace, they have the right to elect a health and safety representative from among themselves. The main functions of the health and safety representative are to collect information on safety, health and welfare of employees; to inspect the workplaces and to investigate and report on the causes of accidents and diseases at work.

The employer has the duty, *inter alia*, to provide the health and safety representative with sufficient information in order to perform these functions and to consult with him or her on any policy on health, safety and welfare that may apply to the employees represented.

7.5 Health and safety requirements for domestic workers

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The employer must provide the domestic worker with a uniform and personal protective clothing, without charge. The uniform and protective clothing must be replaced at reasonable intervals.

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27 This means “to a willing person, injury is not done”.
Upon hiring of a domestic worker, it is required to provide a health and safety induction to the worker, without charge. The induction must at least include training on possible hazards, such as potentially dangerous equipment and toxic substances; proper use and maintenance of personal protective equipment; and safe work techniques relating to domestic work.

7.6 Employer’s duties to persons other than employees

Every employer also has a duty to conduct its business operations in such a manner that persons who are not employees of that employer are not exposed to the risk of their safety or health. The Minister may, by regulation, require the employer to inform persons who are not employees of that employer of any risk to their safety or health that might arise from the conduct of that employer’s business.

8. MISCELLANEOUS DUTIES

8.1 Provide transportation to employee on termination of employment

Section 28: Labour Act: Provision of accommodation
Section 36: Labour Act: Transportation on termination of employment

If an employee is dismissed during the first 12 (twelve) months of employment at any place other than where the employee was recruited, the employer must either transport the employee to the place of recruitment or pay the employee an amount equal to the costs of that transport, unless the employee unreasonably refuses to be reinstated.

8.2 Provide a transport allowance to a live-out domestic worker

A live-out domestic worker is entitled to receive a transport allowance for travel to and from work for each day of work, where public transport is available, unless the employer provides transport. The transport allowance must be equal to the costs of a round-trip public transport.

8.3 Provide food

An employer must provide suitable food in reasonable quantities to meet the reasonable needs of an employee who is a live-in -, or a live-out domestic worker who qualifies for a meal interval (in terms of section 18 of the Labour Act). 30

Employees in the agricultural sector should be allowed to keep livestock and to cultivate land to meet the reasonable needs of the employee and his or her dependants; or the employer must provide the employee with food or rations to meet such needs; or pay the employee an additional allowance. 31

8.4 Provide employee with a certificate of employment on termination of employment

Section 37(5) & (6): Labour Act: Payment on termination and certificates of employment

An employer must provide an employee who leaves its service with a certificate of employment, irrespective of the reason for termination. The certificate of employment must contain the following particulars:

♦ Employee’s full name;
♦ Name and address of employer;
♦ Description of industry in which the employer is engaged;
♦ Date of commencement and date of termination of employment;
♦ Employee’s job description;
♦ Remuneration at date of termination;
♦ If employee requests, the reason for termination.

It is important to note that the reason for termination may not be stated, unless the employee specifically requested the employer to mention it on the certificate of employment.

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31 The minimum additional allowance is currently determined in terms of a collective agreement applicable to the agricultural sector.
An employer is entitled, but not obliged, to provide an employee with a testimonial or other certificate of good character.

8.5 Duty to keep records

Section 130: Labour Act: Records and returns

Every employer has the duty to keep a record of every current employee for the most recent 5 (five) years and retain the record of every employee who left the services of the employer for a period of 5 (five) years after the termination of the employment contract. This record must contain certain particulars, as prescribed in terms of section 130(1) of the Labour Act.

8.6 Allow time off to health and safety representatives and workplace union representatives

Section 43 (4): Labour Act: Election of health and safety representatives
Section 67(5): Labour Act: Workplace union representatives

The employer is obliged to grant each health and safety representative and each workplace union representative\(^{32}\) respectively time off during working hours without loss of pay in order to perform the functions of the said offices and further grant such representative reasonable leave of absence to attend meetings or training courses.

\(^{32}\) The functions of workplace union representatives shall be discussed in more detail in the Labour Law 1B guide.