

Maternity Leave - (Tshepang Mokhurutshe, Pupil Attorney)

Botswana, like many other countries, has through provisions of the Employment Act (“the Act”), afforded women a clear right to be paid whilst on maternity leave. The Act affords *every female employee* a right to a minimum total of twelve (12) weeks maternity leave, i.e six (6) weeks before confinement and six (6) weeks immediately after confinement.

Confinement is defined under the Act as **“the delivery of child”**.

Section 113 (2) of the Act provides that **“upon receipt of a doctor’s notice, the employer shall immediately permit the female employee in question to absent herself from work until her confinement and thereafter he shall not permit or require her to return to work until the expiry of six weeks immediately after her confinement”**.

The questions that many employers often pose are, “what happens if an integral member of my workforce is due to go on maternity leave, and I know that the business will suffer without her?” or “what happens if the company is involved in a crucial transaction that requires the expertise of your female employee who is due to go on maternity leave?”

Can an employer negotiate that the female employee take leave for a shorter period than stipulated by the Act? Can the employer arrange to pay the female employee an inflated salary in lieu of her taking the full twelve (12) week maternity leave? Can the female employee perhaps work from home?

The Act provides an answer to the above questions. Section 113 (8) of the Act states, **“any employer who knowingly permits or requires any female employee to perform any work under her contract of employment within six weeks immediately after her confinement shall be guilty of an offence and liable to the penalties.”** This means that even at the employee’s insistence, an employer cannot allow the employee to perform ANY work under her employment contract. This could include some of the most miniscule of tasks like attending to emails, phone calls or even instructing or providing guidance to other employees. It is crucial to appreciate that this means that the employee cannot choose to contract out of her rights as the onus and burden of compliance lies entirely with the employer.

Failure to adhere to these provisions may result in the employer being liable for a fine not exceeding P1 500 or to imprisonment for a term not exceeding 12 months or to both.

Whilst this may not be a common issue or topic of litigation in our Courts, it is critical that employers maintain a cautious approach to rights, entitlements and obligations of female employees falling under these provisions.