

Cobalt Solutions
For Business Owners



Paying Employees a “Flat Rate”

Basic Conditions of Employment Act (BCEA)

Question: May an employer pay its employees a “flat rate” (e.g. including pay for overtime worked, work on Sundays and public holidays, annual leave, sick leave, family responsibility leave)?

Answer: It is possible, in principle, for employers and employees to agree to the payment of a rate that includes annual leave pay (i.e. paying for leave in advance), as there is nothing in the Basic Conditions of Employment Act (BCEA) that specifically precludes the parties from doing so. The employees would then still be entitled to take leave, but it would be unpaid. The situation is rather uncertain when it comes to an all-inclusive rate for other aspects, such as sick leave, family responsibility leave, overtime, work on Sundays and public holidays.

Brief explanation: The attraction of paying an all-inclusive rate lies in its simplicity. The Labour Court (*Minny & another v Smart Plan*, 2009) has on occasion sanctioned leave pay being paid as part of an all-inclusive rate. The court concluded that, in principle, an employer would not contravene the BCEA if it contracted with an employee to pay for annual leave as part of an inclusive rate, where the leave is effectively paid for in advance (In this case the employees failed with a claim for leave pay to be paid after termination of their services. If they had still been employed, the employees would not have been be entitled to pay when they took their annual leave).

Sweeping contractual provisions that refer to a rate which also includes other aspects of remuneration, such as pay for sick leave, family responsibility leave, overtime, work on Sundays and public holidays may be viewed as being contrary to the objects of the BCEA. It is possible to fashion an agreement that includes some of these aspects, but this should be done with caution: At the very least, the employer must be transparent about what the all-inclusive pay comprises and employees must be made aware of their rights in terms the BCEA (or relevant Sectoral Determination or Bargaining Council). The employer must ensure that the total amount the employee receives is no less favourable than the employee would have received if these rights accrued normally in terms of the BCEA, Sectoral Determination or Bargaining Council. This would be difficult to demonstrate unless there is a comparative norm, such as past practice within the company or a prescribed minimum wage.

While paying an all-inclusive rate might be possible in some instances, this is not an area that an employer should venture into without having obtained advice from an expert in the field of labour law.

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