

Hours of Work and Overtime Nicolene Erasmus and Jan du Toit

Working time including overtime is regulated by the Basic Conditions of Employment Act in Chapter two. Chapter two of the Act is however not applicable to the following employees:

1. senior managerial employees;
2. employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work;
3. employees who work less than 24 hours a month for an employer.

Every employer South Africa must regulate the working time of each employee;

1. in accordance with the provisions of any Act governing occupational health and safety;
2. with due regard to the health and safety of employees;
3. with due regard to the Code of Good Practice on the Regulation of Working Time issued under section 87(1)(a) of the Act; and
4. with due regard to the family responsibilities of employees.

As per section 9 of the basic conditions of employment Act, the maximum normal working time for an employee below the threshold* is 45 hours per week. This would mean a maximum of nine hours in any day if the employee works for five days or fewer in a week and eight hours in any day if the employee works on more than five days in a week.

**Please see the detailed explanation at the bottom of this document.*

This does not mean that the employee must work 45 hours per week normal time. The amount of normal time worked is a matter of contractual agreement between employer and employee. Some employees for instance only work a 40 hour week. The statutory limitation of 45 hours per week means that the employee may not work more than 45 hours per week normal time. Employees who earn above the determined threshold amount must negotiate the normal amount of working hours per day or per week with the employer. The employee may therefore be expected to work more than 45 hours per week.

It must be taken into consideration that meal and tea breaks are not included in the calculation of working hours and will therefore be unpaid. As meal breaks are unpaid the employee can for instance read a book or go and do some shopping. An employee must be remunerated for a meal breaks that the employee was required to work or to be available for work. Further to this the employee must be paid for any portion of a meal interval that is in excess of 75 minutes, unless the employee lives on the premises at which the workplace is situated.

Therefore an employee who works a 5 day week and who receives a meal break of one hour per day will actually be at the workplace for 50 hours weekly (45 hours normal working time plus 5 hours daily meal breaks). The meal break is to be provided after five hours continuous working time. Tea breaks do not qualify as a break in working time. The statutory meal break is 1 hour, but by agreement between the employee and employer this may be reduced to 30 minutes.

The maximum permissible overtime as per section 10 of the Basic Conditions of Employment Act is 10 hours in any 1 week. As per the definitions of the Act a week means the period of seven days within which the working week of that employee ordinarily falls and a day a period of 24 hours measured from the time when the employee normally commences work. Employees earning below the threshold must be paid 1.5 times the

normal wage rate for overtime worked except for Sundays. Overtime on a Sunday must be remunerated a double the normal wage rate.

In *Maneche & others v CCMA & others* [2008] 1 BLLR 52 (LC) the employees left work one day on the ground that they had already worked the maximum amount of hours overtime permitted by the Basic Conditions of Employment Act 75 of 1997. They were charged with insubordination, and dismissed. The dispute was referred for arbitration by the CCMA. The respondent commissioner reasoned that the employees had, for many years, worked overtime in excess of the permitted three hours per day when the respondent's peculiar operational requirements called for packing of freshly picked mushrooms and that, on the day in question, the packing would have taken only about 15 to 30 minutes' more overtime work to complete. The commissioner upheld the applicant's dismissals.

On review the Labour Court found that the Act takes precedence over any agreement or practice, and that applicants should not have been prejudiced for refusing to return to work after the daily limit on overtime work had been reached. For that reason, the award is reviewable and should be set aside.

The Labour Court ordered that the dismissal of the employees was substantively unfair and they were to be reinstated, without loss of benefit, from the date of their dismissal.

By agreement the employer may allow an employee paid time off for overtime worked instead of paying the employee. The employee will then be entitled to 90 minutes paid time off for every 60 minutes overtime worked. The referred paid time off must be granted to the employee within one month after working the overtime, but by agreement this period may be extended to 12 months.

Employers must also take into consideration that an agreement by the employee to work overtime that was reached during the first three months of employment, lapses after one year. The onus will therefore be on the employer to reconfirm the commitment of the employee to work overtime after a period of 12 months.

Employees who earn in excess of the present threshold amount are not subject to the provisions of section 10 (overtime) of The Basic Conditions of Employment Act. This means that such employees cannot demand to be paid for overtime worked, nor can they demand to be granted paid time off. However contrary to popular belief, the employer also cannot force such employees to work overtime and cannot demand that they work overtime without compensation, unless the employee agreed to this.

All forced labour is prohibited in terms of section 48 of the Basic Conditions of Employment Act and should the employer require such employees to work overtime, then the hours to be worked and the basis of compensation will have to be negotiated between the two parties.

What is "overtime worked"? As per the Basic Conditions of Employment Act all hours worked in excess of the employee's normal daily or weekly hours of work will be regarded as overtime hours. Therefore if an employee is contracted to work 45 hours per week normal time, then any hours in excess of that is overtime. Similarly if an employee is contracted to work 40 hours per week normal time, then any hours in excess of the 40 hours is overtime.

Overtime is not compulsory and employees can refuse to work overtime on short notice, unless the employee contractually agreed to be available to work overtime on short notice. In circumstances where overtime work on short notice is required by the employer, fairness towards the employee must be taken into consideration. Despite the aforementioned an

employee cannot refuse to work overtime if the work which is required to be done must be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision for, such as for instance the sudden breakdown of equipment.

An employee that works on a Sunday must be remunerated at double his normal wage rate for each hour worked, unless he ordinarily works on a Sunday, in which case he must be remunerated at 1,5 times his normal wage rate for each hour worked.

Work on a public holiday is by agreement only and an employee must be paid double his normal daily rate for work on a public holiday if the employee would've ordinarily worked on that public holiday. Should an employee be expected to work on a public holiday on which he / she would not normally work on, then the employee must be paid at least his normal daily wage plus the normal wage rate for the hours worked.

The Earnings Threshold Explained

Section 6 of the Basic Conditions of Employment Act makes provision for the Minister of Labour to publish a determination on the advice of the Commission that will exclude employees earning above a certain amount per year from sections of chapter 2 of the Act. Chapter 2 primarily deals with the regulation of working hours of employees. The current threshold is R205 433.30 per year.

Employees earning under the threshold amount:

These employees have the full protection of every section of the Basic Conditions of Employment Act (BCEA).

The Act entitles such persons to certain things such as:

- Overtime may only be worked by agreement between employer and employee.
- The employee has the legal right and entitlement **to demand** payment for overtime worked at the rate of 1,5 times his normal wage rate, or at whatever rate is applicable (not less favourable than the minimum set in the Act).
- The employee can also enter into an agreement with the employer whereby he can be given time off work instead of payment for overtime worked.
- Generally, the employee can *legally* refuse to work more than 45 hours per week normal time and he can *legally* refuse to work more than 10 hours per week overtime and he can *legally* refuse to work more than 12 hours in any one day, consisting of nine hours normal time and three hours overtime. There are some circumstances where the employee may not be able to refuse, such as in emergency overtime.

There are some other conditions as well, but we are not going to go into all of them here.

From the above you will note that persons earning under the threshold have a legal right to demand.

Employees earning over the threshold amount

Persons earning over the threshold amount **do not have** a legal right **to demand** anything in respect of Sections 9, 10, 11, 12, 14, 15, 16, 17(2), and 18(3) of the Act with effect from 1 July 2014.

(a) Employees earning **under** the threshold **have a legal right to demand** in respect of the above-mentioned sections.

(b) Employees earning **over** the threshold **do not have** a legal right to demand in respect of the above-mentioned sections.

The employee earning over the threshold amount, do however have a **right to negotiate**.

Thus, the employee earning over the threshold amount must approach the employer, negotiate and reach agreement on how many normal hours and overtime work will be required from the employee. Once this has been established the parties must agree on remuneration for the overtime worked. Such remuneration may be less than the minimum prescribed by the Act.

The same must be agreed upon for work on public holidays as per section 18(3) and work on Sundays. The employee earning over the threshold cannot **demand** and must therefore **negotiate**.

The **employer** is in a similar position; the employer also cannot **demand** that employees earning over the threshold must work overtime, standby duties, attend callouts etc, without limitation and without compensation.

The reason why the employer cannot make those demands is stipulated in section 48 of the BCEA, which reads as follows:

1. Subject to the Constitution, all forced labour is prohibited.
2. No person may, before his or her own benefit or for the benefit of someone else, cause, demand, or impose forced labour in contravention of subsection (1).

Therefore, for employees earning over the threshold, the employer is in the same situation in that he cannot **demand** but must instead also **negotiate**.

It is extremely important to remember that the employer may not, upon learning of the threshold earnings notice, make unilateral changes to the employment conditions of employees earning in excess of R205 433.30 per annum. The conditions agreed upon in the initial employment agreement are legally binding and must be honored unless it is mutually agreed to changes these conditions.