THE ANTICIPATED LEGISLATIVE OVERHAUL TO EXISTING MATERNITY AND PARENTAL LEAVE PROVISIONS: FREQUENTLY ASKED QUESTIONS

1. What do we know at this stage?

The High Court has stated that a single parent or two parents (birthing parents, adoptive parents and surrogacy commissioning parents) are collectively entitled to at least four consecutive months of parental leave. In doing so, the Court declared sections 25 and 25A – C of the Basic Conditions of Employment Act, 1997 (BCEA) invalid given the inconsistency with sections 9 and 10 of the Constitution to the extent that they unfairly discriminate between mothers and fathers or between one set of parents and another, based on whether the children were born of the mother, conceived by surrogacy or adopted.

The High Court has proposed, among other things, replacing the existing section 25(1) of the BCEA (dealing with maternity leave) to entitle an employee, or a pair of parents collectively, to at least four consecutive months of parental leave to be taken in accordance with their election where:

- one parent takes the full period; or
- each parent takes turns taking the leave.

This is provided that both employers are notified prior to the date of birth in writing of the election and, if a shared arrangement is chosen, the period or periods to be taken by each parent.

2. Are the relevant provisions of the BCEA regulating maternity and parental leave, still in force?

Yes, the declaration of invalidity is subject to confirmation by the Constitutional Court. The current provisions of the BCEA (and other legislation impacted by the order) will remain in force until confirmation is made or amendments to the legislation are enacted.

3. What then is the effect of the High Court order?

While the legislative landscape within which employers must operate is, at this stage, unaltered, the order of the High Court may have implications for the individual and collective bargaining landscapes, as employees may now seek to bargain for those rights the High Court has ordered should be in place.

4. What happens next?

The Constitutional Court must be approached for an order to confirm the order of the High Court.

5. What are the anticipated timelines?

An application of this nature may take between 12 – 18 months to reach a conclusion (ie a judgment of the Constitutional Court).

6. What are the possible outcomes in the Constitutional Court?

In the first outcome, the Constitutional Court can confirm the order of the High Court or propose alternative legislative provisions until parliament enacts the legislation. Another possible outcome could be that any confirmation of the order of the High Court or alternative interim provisions ordered will apply from the date of such order.

7. What does this mean for employers now?

There is no immediate legislative impact on employers. However, employers need to be mindful that employees will possibly now seek enhanced parental leave benefits in line with (or coming close to) those ordered by the High Court. If employers fail to be proactive in seeking to review existing parental leave benefits, this may impact talent retention and any collective bargaining processes.

8. What can employers start doing now in anticipation of a change in the legislative landscape?

8.1 Employers can be proactive in seeking to understand workplace dynamics (against the existing contractual entitlements and benefits in place) to anticipate how the amendments ordered by the High Court may impact them if or when confirmed. Ultimately, our view is that change to the existing parental leave landscape is coming, and employers will be better placed to anticipate such change, rather than reacting to it when it happens.

8.2 Employers could conduct an assessment of their current parental leave entitlements in the workplace by having regard to:

- contracts of employment;
- collective agreement;
- bargaining council agreement;
- workplace policies and procedures; and
- workplace practice.

8.3 Employers that have the financial and operational ability to do so may seek to make amendments to existing benefits (and even contractual entitlements) to more closely align to that which appears to be coming (either by confirmation of the Constitutional Court or through legislative intervention). Similarly, employers who currently offer enhanced parental leave benefits may opt to (or need to) reduce such benefits. This is so that the employer is able to anticipate the increased number of employees who will be entitled to such benefits.

8.4 Any such amendment to benefits or contractual arrangements is then done based on what each individual employer believes to be best for its operations, nuanced with the anticipation of such changes becoming statutory obligations (to a lesser or greater extent).

8.5 To ensure that the workforce understands the status of the order and what can be anticipated, employers should communicate the consequences of the order of the High Court to its workforce. Such communication may dispel misinformation and allow for employee participation in any endeavours to revisit the parental leave landscape by the employer.

9. Are employers now open to legal challenge if their parental leave benefits and/or contractual arrangements do not mirror the order of the High Court?

Employers have always been exposed to claims that the parental leave benefits they provide (or the entitlements that they enforce) are discriminatory, particularly in circumstances in which such benefits or contractual entitlements go beyond the statutory minimum requirements (which the High Court has not determined to be inconsistent with the Constitution). If anything, the High Court order may galvanise such challenges as employees might turn to courts or tribunals to vindicate what they believe to be an entitlement to better parental leave benefits, instead of simply doing so via individual or collective bargaining processes.

10. Can employers simply change the arrangements they currently have in place?

10.1 An employer cannot unilaterally amend any contractual entitlement to parental leave as these amendments will require employees to be in agreement. This agreement may be difficult to obtain if an employer is seeking, for example, to reduce the extent of paid parental leave benefits it currently offers employees so as to anticipate (and better provide for) the increased costs that may come with a confirmation of the High Court order or legislative intervention (including the increased absence of employees on account of parental leave entitlements).

10.2 Employers have more scope to affect amendments where such benefits are regulated by policies and procedures that are not terms and conditions of employment but must remain mindful that any such challenges may still be the subject of challenge on the basis that any change could constitute an unfair labour practice. This risk of challenge increases where the changes have the effect of diminishing, for example, the extent of paid parental leave.

Should you require further advice on this, please contact your usual Webber Wentzel expert.