

28<sup>th</sup> February 2018

### **Employment Law and other Guidelines in respect of the issue of Sick Notes**

In South African law in respect of employment, a sick note has two basic functions. Firstly it entitles an employee to paid sick leave within the provisions of the Basic Conditions of Employment Act No. 77 of 1997 (As amended) (The Act), and secondly it provides an explanation for, and validation of the absence to the employer.

The payment and proof of incapacity is dealt with at S23 of the Act which states the following:

#### **23 Proof of Incapacity**

*(1) An Employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.*

This indicates that the employee does not have to produce a sick note for each and every absence, but note that the Act specifies that this is required for paid sick leave. It is possible that an employer may still require an explanation of absence and may request a doctor's note on that basis. In the event that a person is absent, claims sick leave and is outside the parameters, they are not entitled to paid sick leave.

The persons who are entitled to issue certificates and who are medical practitioners in terms of S17 of the Medical, Dental and Supplementary Health Services Act No. 56 of 1974 are the following:

1. Medical Practitioners (Doctor with MBChB degree) that are registered with the Health Professionals Council of South Africa.
2. Dentists that are registered with the Health Professionals Council of South Africa.
3. Psychologists with a Masters degree in Educational, Counselling or Clinical Psychology that are registered with the Health Professional's Council of South Africa.

This Act makes reference to the Allied Health Services Professions Act No. 63 of 1982. Practitioners mentioned in this Act must be registered with the Allied Health Services Professions Council in order to issue certificates. Typically this allows registration of 'alternative' or 'other' medical practitioners, including Homeopaths, Naturopaths, Chiropractors, Osteopaths and similar medical practitioners.

Certificates issued by clinics are usually not signed by registered medical practitioners, and as such clinic certificates are not acceptable as sick notes. This means that an examination by an unregistered nurse or another person does not produce an acceptable sick note. Where they are signed by a registered Medical Professional they are acceptable.

S23 (2) of the BCEA (the Act) allows for members of registered professional councils to issue sick notes.

#### **BCEA S23 (2)**

##### **23 Proof of incapacity**

**(2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.**

Thus registered nurses are entitled to issue sick notes.

The Medical and Dental Professions Board rules specify what the guidelines for medical certifications are.

These are found at **Rule 15** and the following information is required:

1.
  - a. The name, address and qualification of the practitioner
  - b. The name of patient
  - c. The employment number of the patient (if applicable)
  - d. The date and time of the qualification
  - e. Whether the certificate is being issued as a result of personal observations by the practitioner during an examination or as the result of information received which is based on acceptable medical grounds.
  - f. A description of the illness, disorder or malady in layman's terminology with the informed consent of the patient. Provided that if the patient is not prepared to give consent, the medical practitioner or dentist shall merely specify, that in his or her opinion based on an examination of the patient, the patient is unfit to work.
  - g. Whether the patient is totally indisposed for duty or whether the patient is able to perform less strenuous duties in the work situation.
  - h. The exact period of recommended sick leave.
  - i. The date of issuing of the certificate of illness
  - j. A clear indication of the identification of the practitioner who issued the certificate which shall be personally and originally signed by him or her next to his initials and surname in printed or blocked letters.
2. If pre-printed stationery is used a practitioner must delete words which are irrelevant.
3. A practitioner shall issue a brief factual report to a patient where such patient requires information concerning him or herself.

The often vexed question arises in respect of sick notes given by traditional healers.

The Traditional Health Practitioners Act was signed into law on 30<sup>th</sup> April 2014. It brought into effect the requirement that from 1<sup>st</sup> May 2015 Traditional Health Practitioners must register with the Council, this being the Traditional Health Practitioners Council and thereafter the traditional healer must conform to the requirements for issuing sick notes as other medical practitioners must. This Act followed on from the Traditional Health Practitioners Act No. 22 of 2007.

So, if a medical certificate meets the criteria outlined above, the Guidelines in the BCEA in respect of payment for sick leave will apply.

Sick notes are often tendered for medical issues where the employee is not sick.

These are the following:

- Routine checkups
- Examinations
- Tests
- Collecting medicine from the pharmacy
- Visits to specialists
- Going to the clinic

Technically the employee is not sick and a sick note will not entitle them to paid sick leave. Employers may if they so wish allow this to be offset against sick leave.

In respect of the traditional healer, a famous case in this regard is that of Kivietskroon Country Estate (Pty) Ltd v Mmoledi & others [LAC JA7810]. The employee was dismissed for taking leave on the basis of traditional healer's certificate due to the fact that she had "premonitions of the ancestors". Interestingly the Labour Appeal Court stated that the Constitution recognises traditional healers and practises so employers should accept these

as well. The employee was reinstated, however the situation has changed as the Act now allows for the acceptance of traditional healer's certificates.

There is no need to accept smudged, ineligible or suspicious sick notes. The employer is entitled to contact a medical practitioner to verify a medical certificate. The verification of this would usually only involve confirming the authenticity of the certificate, as obviously the doctor would be bound by rules of confidentiality in respect of the nature of the patient's malady.

In the event that you receive a medical certificate and suspect that either the medical practitioner or the practise number is fraudulent, two things can be done; you can contact the Health Professionals Council of South Africa, the Allied Health Professionals Council of South Africa or the Traditional Health Practitioners Council to check the authenticity of the practice. In the event that the practitioner is not registered the certificate need not be accepted.

Unfortunately there is a widespread practice of buying doctor's notes. In terms of my work as an Employment Law practitioner, I have on numerous occasions disciplined employees who have tendered false sick notes. A sick note is often signed by a medical practitioner's receptionist or support staff. These persons are in a position of trust, and it occasionally happens that a dishonest person may sell sick notes. Employees often pay for a certificate; the price is dependent on the number of days of sick leave that they want. Therefore it is vital to check and see that the certificate is signed by the practitioner themselves and not by support staff.

Furthermore, the tendering of a fake sick note is fraudulent; it is an effort to get pay for days on which the employee has not worked. It is actionable in terms of criminal law.

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