

# Legal Update for Employers and Employees (Prospective Adoptive Parents)

A New Dawn For  
Adoptive  
Parents: Pre  
Adoptive Leave  
is Now a  
Statutory  
Entitlement



## **The Employment (Amendment) Act, 2021**

The Employment Act 2007 has been amended by the Employment (Amendment) Act, 2021. The Act was as result of a Bill that was introduced by Hon. Martha Wangari, Member of the National Assembly in 2019. The Bill was assented by the President on 30th March 2021 and will take effect on 15th April, 2021. You can access a copy of the Act [here](#).

The Amendment Act has introduced several amendments to the Employment Act, 2007 as follows;

Section 2 of the Employment Act is amended by introducing the following definition;

*“exit certificate” which means a written authority given by a registered adoption society to a prospective adoptive parent to take the child from the custody of the adoptive society;*

The Act also amends section 29 of the Employment Act, by introducing section 29A which provides for pre-adoptive leave as follows:

### **Statutory pre-adoptive leave**

An employee shall be entitled to one month pre-adoptive leave with full pay from the date of the placement of the child in the custody of the employee.

### **Obligations of employees that are eligible for Pre- adoptive leave**

The employee who is eligible for the pre- adoptive leave has the obligation to notify the employer in writing of the intention of the Adoption Society to place the child in the custody of the employee at least 14 days before the placement of the child.

### **Requirement for documentation**

The notice to the employer shall be accompanied by documentation evidencing the intention of the adoption society to place the child in the custody of the employee, including a custody agreement between the employee and the adoption society and an exit certificate.

## **Rights of employees who take pre-adoptive leave**

The rights of employees who take maternity leave also accrue to employees taking pre-adoptive leave and these are;

### **Right to enjoy rights enjoyed by employees who proceed on maternity leave**

The Employee who takes pre-adoptive leave shall have similar/ equal rights enjoyed by employees who proceed on maternity leave. This includes the right to return to the job held immediately before taking the pre-adoptive leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she (or he) not been on pre-adoptive leave.

### **Right to extend pre-adoptive leave in certain circumstances**

Pre-adoptive leave can be extended by consent of the parties, or in the event that the employee proceeds on sick leave, annual leave, or compassionate leave, the pre-adoptive leave will expire on the last day of such extension.

### **Right not to have annual leave entitlement forfeited**

The employee who proceeds on pre-adoptive leave should not forfeit their annual leave entitlement.

### **Are male employees entitled to pre-adoptive leave?**

Employers have raised questions as to whether male employees would be entitled to pre-adoptive leave. The uncertainty has stemmed from the fact that only female employees are entitled to maternity leave of three months with the male employees being entitled to a shorter two weeks paternity leave under Section 29(8) of the Employment Act.

In our view, male employees are entitled to the full extent of the pre-adoptive leave. The basis of our view lies in the wording of the amendment which does not specify the gender of the applicant/ employee. The relevant section which is 29A (1) provides as follows:

*“Where pursuant to section 157 of the Children Act, a child is to be placed in the continuous care and control of an applicant who is an employee under this Act, the employee shall be entitled to one month’s pre-adoptive leave with full pay from the date of placement of the child.”*

Under section 158 of the Children Act, adoption may be by:

- a. A sole male applicant
- b. A sole female applicant
- c. Jointly by two spouses

Reading the amendment together with the above provisions of the Children Act, it is our view that all the categories of applicants listed above would be entitled to the pre-adoptive leave. We do not see anything in the wording of the amendment that would reduce the entitlement of men to adoptive leave even where the male employee applies jointly with her female spouse.

## **Progressive and welcome amendment**

During adoption, the child is usually placed with the adoptive parents to allow them opportunity to bond.

In the previous dispensation, a child would be placed with the adoptive parents but they were not granted any leave time to bond and develop a relationship with the intended new member of the family. If the parents needed time, they would have to utilize their normal leave days.

The Bill had proposed a three months pre-adoptive leave similar to maternity leave. However, this was reduced to one month.

The amendment is welcome as it alleviates this problem by making provision for pre-adoptive leave.

It is commendable that some progressive employers had already recognised the need and value of pre-adoption leave and already provided for the same in their Human Resource Handbooks and Manuals.

Given its importance, nothing stops employers from providing a longer pre-adoptive leave than that stipulated in the law.

## **No other amendments other than pre-adoptive leave**

The Employment (Amendment) Act 2021 specifically deals with the rights and obligations of adoptive parents and their entitlement to leave on adoption. It did not introduce other amendments as has been widely circulated in the recent past.

We provide this legal update to so that employers and prospective adoptive parents should now be aware of pre-adoptive leave going forward.

## Conculsion/ Important to note:

- 1.The amendment provides for one month pre-adoptive leave for employees where a child is placed with them pursuant to section 157 of the Children Act
- 2.The amendment takes effect on 15th April 2021
- 3.The leave is from the date of placement of the child
- 4.The law does not specify/ discriminate the gender of the applicant for adoption
- 5.Employees required to notify employers and provide supporting documentation
- 6.Employees entitled to adoptive leave are to enjoy rights similar to those enjoyed by employees who proceed on maternity leave
- 7.The Employment (Amendment) Act, 2021 specifically deals with the rights and obligations of adoptive parents and their entitlement to leave on adoption. It did not introduce other amendments as has been widely circulated in the recent past.
- 8.Employers and employees should be aware of the amendment and how the leave operates.

*Disclaimer: Kindly note that this write-up does not constitute legal advice and is provided free of charge for information purposes only. If you have any specific inquiries on the subject, please contact the undersigned.*

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Irene Kashindi is recognised in Band 1 in Employment by Chambers Global 2021. She is widely lauded as one of the field's most prominent lawyers, with a practice encompassing contentious and non-contentious work.

She is regularly instructed by notable regional employers in sectors including telecoms and consumer goods in connection with executive dismissal and labour disputes. Clients consider her to be *"thorough and very professional"* and appreciate her for going *"above and beyond what is required."*

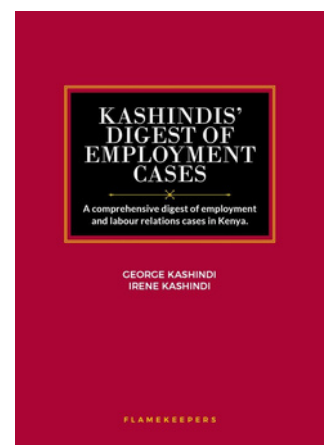
## About MMK Employment Practice

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MMK has a distinguished employment law practice ranked in tier 2 by Legal 500 and in Band 3 by Chambers and Partners. Our expertise extends to advising and representing clients in all aspects of employment law. We handle both contentious and non-contentious matters including representations in court, drafting employee contracts, drafting and reviewing policies and manuals, advice on termination, dismissals, redundancies and restructuring, managing employee exits, advising on post termination restrictions, advising on collective bargaining and negotiations, secondment, outsourcing etc.

We regularly conduct training on employment and labour relations matters, conducting HR and labour law audits, termination and statutory and legal compliance.

Our partners George Kashindi and Irene Kashindi have co-authored a comprehensive case law Digest of recent employment and labour relations by Kenyan Courts known as **“Kashindis’ Digest of Employment Cases”**





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