

# Employees with children: extra leave entitlement (3/3/17)

All employees who have custody of children, i.e. the father, mother, one of the adopters who has been awarded custody and supervision of an adoptable child by an orphans' court order before adoption is legally confirmed, the member of a foster family who has entered into an agreement with the municipality, a guardian, or any other person who is in fact caring for and bringing up a child by an orphans' court order, are entitled to extra leave. This article explores how you can exercise this right in practice.

## The legal framework

The length of extra leave depends on the number of children, their age and disability status:

- at least one day where there is one or two children up to 14 years old;
- three days where there are three or more children up to 16 years old, or a disabled child up to 18 years old.

To obtain extra leave, the employee must show the employer a supporting document such as the child's birth certificate or the employee's passport with a note of the child's existence. If the child is disabled, then a document granting disability status to the child must be shown. Both parents are entitled to extra leave, even if they are both employed by the same employer. If the employee has not claimed or taken extra leave before, it can be claimed for the last two years.

## Application in practice

Questions might arise where the parents are divorced or separated. Section 151(1)(1) of the Labour Code has been amended with effect from 2015 to replace the words "who have" with the words "who have custody of," and this changes the way this clause is interpreted.

Under section 177 of the Civil Code, custody of the child means maintenance, i.e. providing food, clothing, housing, health care, education and upbringing (ensuring the child's mental and physical development, considering the child's individual abilities and interests as far as possible and preparing the child for publicly useful work). Under section 178 of the Civil Code, parents living together exercise their parental authority jointly. If the parents are separated, their joint parental authority continues, but custody and supervision will be awarded to the parent with whom the child is living.

It follows from the two sections of the Civil Code that both parents are entitled to extra leave if they are living together, because they have joint custody of the child, or only one of the parents if they are separated, i.e. the one with whom the child is living.

The above is a theoretical interpretation of the law, and so it is important to note that government agencies interpret these amendments in a different way, i.e. that it was not the lawmaker's intention in making these amendments to curtail the extra leave entitlement for parents who are separated, but rather to grant extra leave to those who have custody of an adoptable child before adoption is confirmed. However, the grounds for this opinion of government agencies are not to be found in the annotation to the amendments to the Labour Code nor in any official statement.