

The COVID-19 virus: Government measures and their effect on the workplace

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Introduction

1. The world has to face the devastating effects of the COVID-19 virus, commonly known as the Coronavirus. The virus is highly infectious and is reported to spread through coughing or sneezing, close personal contact and touching an object or surface on which the virus is found. It is a new strain that was discovered in 2019 and has not been previously identified in humans. Common signs of infection include respiratory symptoms, fever, cough, shortness of breath and breathing difficulties. In more severe cases, infection can cause pneumonia, severe acute respiratory syndrome, kidney failure and even death. On 11 March 2020, the Coronavirus was declared a pandemic by the World Health Organization ('WHO').
2. The number of confirmed cases of the virus is growing exponentially and as a result countries have had to take steps to prevent the further spread of the virus. In South Africa, Dr Nkosazana Dlamini-Zuma, designated under s 3 of the Disaster Management Act, 2002 ('the DMA'), declared a national state of disaster in terms of s 27(1) of the DMA.
3. Following the declaration of the national state of disaster, Regulations with measures aimed at preventing the escalation of the disaster were promulgated in terms of s 27(2) of the DMA ('the Regulations'). On 25 March 2020, the government implemented a lockdown and the Regulations were amended in order to provide for it. The lockdown was implemented with effect from 26 March 2020 until 16 April 2020. Some of the measures provided for under the lockdown are extraordinary. They include the following:
 - 3.1. No person may leave their place of residence except for the purposes of performing an 'essential service', obtaining an 'essential good or service', collecting a social grant, or seeking emergency, life-saving or chronic medical attention;

- 3.2. All businesses other than those involved in the manufacturing, supply or provision of 'essential services or goods' must cease operations;
 - 3.3. Retail shops and shopping malls must be closed, except where essential goods are sold and, where essential goods are sold, the sale of non-essential goods is prohibited;
 - 3.4. Gatherings other than funerals are prohibited; and
 - 3.5. The movement of persons and goods is restricted.
4. The implications of the above measures on employees are serious, especially those employees who are not involved in the manufacturing, supply or provision of essential goods or services ('non-essential employees'). Here I consider the following important questions:
- 4.1. Whether an employer is required to remunerate a non-essential employee during the lockdown;
 - 4.2. Whether employers may request non-essential employees to take leave during the lockdown period;
 - 4.3. In the case of employees involved in essential services or goods:
 - 4.3.1. Employer's health and safety obligations towards its employees;
 - 4.3.2. Steps to be taken by an employer if an essential services employee is confirmed of having contracted the COVID-19;
 - 4.3.3. Steps to be taken by an employer if an essential services employee is suspected of having contracted the COVID-19 virus; and
 - 4.3.4. Whether an employer is required to remunerate an essential services employee who is confirmed or suspected of having contracted the COVID-19.

5. This article serves as a general guide and will be updated as and when the conditions of the lockdown are amended. It is not intended to constitute legal advice and clients or prospective clients with specific questions are encouraged to contact the writer.

Whether an employer is required to remunerate a 'non-essential employee' during the lockdown

6. In terms of the Regulations, those businesses not involved in the manufacturing, supply or provision of essential goods or services must cease operations during the lockdown period. As a consequence, the majority of businesses are closed and it would be illegal for them to continue operating, except in cases where employees are able to work remotely from their place of residence. The question is whether employees, who as a result of the lockdown are not able to work, are entitled to remuneration in respect of the lockdown period.
7. The Regulations are silent on the remuneration of employees. It is therefore necessary regard must be had to existing employment laws.
8. The payment of remuneration is regulated by the Basic Conditions of Employment Act, 1997 ('the BCEA'). Both the BCEA and the Labour Relations Act, 1996 define 'remuneration' as 'any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State.' By definition, remuneration is payment in return for work. Therefore where there are no services rendered by an employee, there is no obligation on the employer to pay remuneration except in cases of paid annual, sick or family responsibility leave and other leave provided for by statute. This is the case in respect of strikes as well, including protected strikes.
9. Perhaps tellingly, in the only directive issued by the Minister of Employment and Labour in response to the lockdown (Covid-19 Temporary Employee/Employer Relief Scheme, 2020) the Minister merely encourages employers to continue paying employees but recognises that in some cases this may be economically impossible. In the directive, the Minister of Employment and Labour establishes a scheme under the Unemployment Insurance Fund 'to compensate

employees who have lost income due to the Covid -19'. The following principles apply to the scheme:

- 9.1. The employer must as a result of the Covid-19 close its operations and suffer financial distress;
 - 9.2. The benefits will only pay for the cost of salary for the employees during the temporary closure of the business operations;
 - 9.3. The salary benefits will be capped to a maximum amount of R17 712, 00 per month, per employee; and
 - 9.4. For the employer to qualify for the temporary financial relief scheme, it must be registered with the Unemployment Insurance Fund ('UIF').
10. Employers and employees are therefore encouraged to consider the above initiative.

Whether an employer may request an employee to take annual leave during the lockdown period

11. Whether an employer can request a non-essential employee to take annual leave during the lockdown depends on the provisions of the contract of employment.
12. Typically, employment contracts provide that 'annual leave is to be taken at a time mutually agreed by the Company and Employee, provided that the Company may direct the Employee to take annual leave at certain times during the year such as Christmas or other company shut down.' In this case, an employer may request an employee to take annual leave during the lockdown. If there is no such provision, it is up to the employee if he or she prefers to take annual leave.
13. Should the employee elect not to take annual leave, it should be made clear to the employee that, at stated above, there is no obligation on the employer to remunerate him or her while at home. The employer is entitled to treat the leave as unpaid leave.

14. The alternative for the employer is to lodge a claim with the Department of Employment and Labour in terms of the Covid-19 Temporary Employee/Employer Relief Scheme, 2020.

Employer's health and safety obligations towards essential service employees

15. Businesses involved in the manufacturing, supply or provision of essential services or goods are permitted to continue operations during the lockdown. Employees of those businesses may be required to report for work and employers will need to ensure their health and safety in the workplace.
16. The health and safety of employees in the workplace is regulated by the Occupational Health and Safety Act, 1993 ('the OHSA'). In terms of the OHSA, employers have the general duty to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees.
17. For information purposes, the OHSA requires employers to provide employees with such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, employees' health and safety in the workplace. In this regard, employers should provide employees with sufficient information on the coronavirus in form of display posters or communiques setting out the symptoms and encouraging them to self-monitor for infection. The information should preferably be in a language that the majority of the employees understand.
18. The OHSA further requires employers to take such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees. In the context of the coronavirus, the employers are obligated to manage and minimise the risk of infections in the workplace by ensuring that the workplace is clean and hygienic and take other preventative measures such as ensuring that employees have reasonable access to masks and sanitizers. Other additional steps may include, where possible, permitting employees to work from home, limiting physical interaction between employees and/or clients, avoiding unnecessary gatherings or meetings and use facilities such as Skype or conference calls.

19. In the event of a suspected case, employees should be free to confidentially report to the employer and the employer should ensure that the employee is tested and steps to prevent further transmissions are taken immediately. These may include the affected employee/s being quarantined.
20. Employers such as retail shops must also comply with government guidelines on social or physical distancing.

Steps to be taken by an employer if an employee involved in essential services is confirmed of having contracted the COVID-19

21. As already stated, the employer must ensure that the working environment is safe and without risk to the health of its employees. With the coronavirus being highly infectious, ensuring that the working environment is safe and without risk to the health of its employees would entail eliminating any risks of transmissions from one employee to another. If an employee is confirmed of having contracted the virus and has recently been in the workplace, the employer must ensure that employee is quarantined or isolated. In addition, the employer must immediately take steps to identify which other employees and/or clients who worked closely with the infected employee and inform them of the possibility of exposure. Any such employees or clients should be requested to submit themselves to a medical examination, self-isolate and work from home until such time that they have returned a negative result and the risk of infection has been completely eliminated. Furthermore, the employer must ensure that the workplace is not in any way contaminated.

Steps to be taken by an employer if an essential employee is suspected of having contracted the COVID-19 virus

22. If an employee is reasonably suspected of having contracted the COVID-19 or came into contact with a person who is a carrier of the virus, the employee should be requested to immediately self-isolate or work from home and submit to a medical examination.

Whether an employer is required to remunerate an essential service employee who is confirmed or suspected of having contracted the COVID-19

23. Whether an employer is required to pay an employee would depend on the circumstances. If the employee is confirmed of having contracted the virus, there is no discretion as regards isolation, the employee must be quarantined. In those circumstances, the employee is sick and must be on paid sick leave allocated to him/her in terms of the BCEA. Where the paid sick leave is exhausted for that particular sick leave cycle, the employee should then be subject to unpaid leave.
24. If an employee is suspected of having contracted the virus and is requested by the employer to self-isolate or work from home, the employee must be paid his usual income.
25. If an employee, without exhibiting any symptoms, decides to self-isolate as a precautionary measure, there is no obligation on the employer to pay the employee and the employee should apply for annual leave. If no annual leave is due to the employee, it must be treated as unpaid leave.
26. The usual principles apply to other forms of leave such as family responsibility leave.