

COVID-19 (CORONAVIRUS) EMPLOYMENT ISSUES



A. GENERAL PRINCIPLES IF THE WORKPLACE IS OPEN

Some of the employer's obligations

1. In terms of the Occupational Health and Safety Act 85 of 1993 ('OHS Act'), an employer is obliged to, as far as reasonably practicable, create and maintain a working environment that is safe and without risk to the health of its employees.
2. It is thus advised that employers develop contingency plans that include, at least, the following:
 - 2.1 the prohibition of physical contact;
 - 2.2 the supply of hand sanitation lotion;
 - 2.3 limitation on meetings; and
 - 2.4 encouraging employees not to come to work if they feel sick (the current sick leave policy should apply or, alternatively, be relaxed).
3. On 17 March 2020, the Minister of Employment and Labour required that all employers should conduct a health and safety risk assessment in consultation with their employees to ensure a healthy workplace during this period.

Joint responsibility of the employer and its employees

4. The employer and employee are jointly responsible for health at the workplace and, therefore, they must jointly proactively identify the risks and develop control measures to make the workplace safe, if it is to stay open during the period of the lockdown.
5. It is thus advised that joint policies should be adopted to curb the spread of the coronavirus should the workplace be open during the lockdown period in circumstances where, for instance, the employer is engaged in essential service delivery.

B. GENERAL PRINCIPLES, WHETHER THE WORKPLACE IS OPEN OR CLOSED

Working from home and creating a home workplace

6. Whether, within the corporate environment or, alternatively, within the small business environment, this option is permitted.



7. If the employer requires the employee to work the ordinary hours of work, that the employee used to work whilst at the workplace, from home, then the employee is entitled to the normal remuneration so earned.
8. If, however, the employee is only required to work shortened hours from home (i.e. the employer still demands performance, but this entails partial performance), then it is advised that, subject to what is stated herein, the parties negotiate a reduced remuneration (and/or benefits). This negotiation scenario should not be confused with the impossibility of performance scenario dealt with herein, which essentially 'excuses' both parties (employer and employee) from demanding any performance and therefore is not subject to negotiation.

'Special leave'

9. On 17 March 2020, the Minister of Employment and Labour announced that, if employees are required to subject themselves to self-quarantine for 14 days (or longer), such leave will be regarded as 'special leave' and the employees will be permitted to apply for UIF benefits which will be paid on condition that the quarantine meets the necessary requirements.

Annual leave

10. It is permissible that the employer may require an employee to proceed on annual leave. However, this should not be done during periods of self-isolation or quarantine (where 'special leave' applies).
11. In short, this entitlement of the employer is only applicable to the statutory portion of annual leave (i.e. 15 business days).
12. This entitlement of the employer to require employees to take annual leave is obviously subject to contractual rights and obligations (contained in the employees' contracts of employment, leave policy or practices so applicable, as well as collective agreements).
13. In terms of the statutory regulation of annual leave by the BCEA (s20):
 - 13.1 such leave must be granted by an employer in terms of an agreement between the parties;
 - 13.2 in the absence of an agreement, the employer may determine the time that such leave is to be taken – as is the case with the current lockdown; and
 - 13.3 during the period of annual leave, the obligation of the employer is to continue to remunerate the employees.

Employees' sick leave entitlement

14. In terms of s22 of the BCEA, the 'sick leave cycle' means the period of 36 months' employment with the same employer immediately following an employee's commencement of employment.
15. During each sick leave cycle, an employee is entitled to paid sick leave equal to the number of days the employee would normally have worked during a period of six weeks.
16. For an employee who works a five-day week, this, for instance, amounts to 30 days' sick leave per 36 months of employment.



17. Subject to s23 of the BCEA, an employer is obliged to pay an employee for sick leave as follows:
- 17.1 the wage the employee would ordinarily have received for work during such period; and
- 17.2 same to be paid on the employee's usual pay day.

Employer not required to pay sick leave

18. In terms of s23 of the BCEA, an employer is not obliged to pay an employee for sick leave if:
- 18.1 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
- 18.2 on request from the employer, does not produce a medical certificate stating that he or she was unable to work for the duration of the absence, on account of sickness or injury.

Medical certificate requirements

19. It is required that the medical certificate 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. Obviously, if an employee claims his or her entitlement to sick leave on the basis of having contracted the coronavirus, this should specifically be mentioned on the medical certificate and it is preferable that the test results be attached.

Exhaustion of sick leave

20. It is self-evident that, in terms of the BCEA, an employer is not required to pay an employee for sick leave taken after the statutory sick leave entitlement has been exhausted.
21. Obviously, this scenario may be differently regulated by means of contractual rights and obligations contained in an employment contract, sick leave policy or collective agreement.

Reduced salary

22. A business that is permitted to be open during the period of lockdown (e.g. delivering essential services), but whose business levels have been negatively affected by the current circumstances, may wish to reduce the salaries (and/or benefit) of its employees accordingly. It is advised that this is only permissible once, through the process of negotiations, agreement has been reached on such reduced salary. This negotiation scenario should not be confused with the impossibility of performance scenario dealt with herein, which essentially 'excuses' both parties (employer and employee) from demanding any performance and therefore is not subject to negotiation.
23. Also, if, during the lockdown period, the business is totally closed but the employer wishes the employee to perform certain functions from home, then the advice is that the same principle as *ibid* is applicable.
24. However, if the business of the employer is totally closed during the period of the lockdown, the employees have been sent home and the employer does not require its employees to perform any functions whatsoever, then the scenario should be dealt with as a supervening impossibility of performance, as set out hereunder.



C. UIF ASSISTANCE IF THE OPERATIONS ARE CLOSED DOWN

Temporary employee relief scheme

25. The UIF may fund distressed companies directly by means of the temporary employee relief scheme allowance.
26. To qualify, a company must prove that:
 - 26.1 it closed operations;
 - 26.2 as a result of the coronavirus; and
 - 26.3 suffered financial injury.
27. The UIF has provided a dedicated line that will assist all employers/employees/ bargaining councils on 012 337 1997, or relevant key information or changes will be placed on the department's website (www.labour.gov.za) and the application process may be obtained via covid19ters@labour.co.za.
28. If a company is successful, its employees may receive salary benefits up to a maximum of R17 712.00.

Disaster management fund

29. If the employer is forced, as a direct result of the coronavirus pandemic, to close its business for a period and send employees home, this will constitute a temporary layoff.
30. If the employer is unable to pay its employees during this period, the employer can apply for this benefit from the UIF.
31. This benefit will be at a flat rate equal to the minimum wage (R3 500.00) per employee for the period of the closure or a maximum period of three months.
32. In summary, the differences between the temporary relief scheme and national disaster benefit, as indicated above, are as follows:



Temporary relief scheme

National disaster benefit

Background detail

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| <ul style="list-style-type: none">• Payment of the benefit to contributors who have lost income due to the pandemic | <ul style="list-style-type: none">• Payment of benefit to employers closing down operations (including the mandatory lockdown) and implementing temporary layoffs |
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Period

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| <ul style="list-style-type: none">• For a maximum of three months | <ul style="list-style-type: none">• Limited to the period of the shutdown or maximum of three months, whichever is the longer |
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Submission requisitions

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| <ul style="list-style-type: none">• Employer must be registered with the UIF• Employer must submit the following documents:<ul style="list-style-type: none">- letter of authority- MOA between UIF and the employer- completion of prescribed template detailing employee details, e.g. employment history, salary and banking details- if there is a bargaining council, MOA between the employer and such council | <ul style="list-style-type: none">• Employer must submit and provide the following documents to the UIF processing centre:<ul style="list-style-type: none">- UI 19- UI 2.1- UI 2.8- UI 2.7- copy of EEID- confirmation form letter from employer regarding the temporary layoff due to the coronavirus |
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Payment terms

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| <ul style="list-style-type: none">• This benefit is de-linked from the normal UIF benefits• UIF will only pay for the cost of salary (calculated using UI benefit sliding scale (38%-60%) for employees during the closure of the business)• If the employee's income in terms of the above scale falls below the minimum wage of the sector concerned, the employee will be paid a replacement income equal to the minimum wage of the applicable sector, as determined per sectoral determination• The benefit is capped at R17 712.00 | <ul style="list-style-type: none">• In the scenario where the employer is unable to pay its employees:<ul style="list-style-type: none">- the payment is not linked to the UIF benefit structure- the benefit is a flat rate of R3 500.00 per month, per employee, for the period of the shutdown or three months, whichever is the longer• If the employer implements reduced or short time:<ul style="list-style-type: none">- the payment is linked to the UIF benefit structure- the payment is calculated at the difference between what the employer is paying and what the employee usually earns (the difference in value will be used to calculate the UIF benefit applicable using the normal calculations based on credits available to the employee) |
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D. OTHER CONSIDERATIONS IF THE BUSINESS IS CLOSED DOWN DURING THE PERIOD OF THE LOCKDOWN

No work no pay

33. Whatever this is termed as (e.g. unpaid leave, temporary layoff, etc), the employer is relying on the doctrine of supervening impossibility of performance not to pay its employees during the period of the lockdown.
34. The recent publication by the Minister of Co-Operative Governance and Traditional Affairs of regulations ('the regulations') aimed at flattening the coronavirus curve has forbidden the continued operation of businesses not involved in the provision and supply of essential goods and services for a 21-day period from Friday 27 March 2020 to Thursday 16 April 2020 (the so-called 'lockdown').
35. Our viewpoint is that the promulgation of the regulations can be identified as a *vis major or casus fortuitus*, a natural event that was unavoidable and not reasonably foreseeable when the employer concluded various contracts of employment with its employees.
36. To the extent that the promulgation of the regulations affects performance by the employer and employee of their respective obligations in terms of the contracts of employment (as well as other contractual obligations contained, *inter alia*, in collective agreements), such effect would amount to a supervening impossibility for which neither the employer nor the employee is responsible and which neither could reasonably have foreseen or avoided when the contracts were entered into. Therefore, such promulgation and its effect on the performance of obligations under the various contracts of employment is a *vis major or casus fortuitus*, more specifically, an act of state.
37. The general principle is that a party so prevented from performing an obligation is discharged from liability, but subject to the following conditions having been met:
- 37.1 the impossibility of performance must have been unavoidable by taking reasonable measures to prevent it;
- 37.2 the performance of the obligation must have become either objectively or absolutely impossible;
- 37.3 the impossibility of performance of the obligation must not be self-created; and
- 37.4 the risk of performance becoming impossible must not have been assumed by the other party, either contractually, or by operation of law – it is advised that all the aforesaid conditions are being met during the current lockdown so prohibited by the regulations.
38. In the instance where performance is prohibited by law, the inability to perform is an instance of objective impossibility. An act of state (such as the promulgation of the regulations) is an example of such an instance (*Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG 1996 (4) SA 1190 (A)*).
39. In conclusion, as a result of the lockdown, both the employer and the employee are unable to perform their reciprocal contractual obligations and, provided that the employer does not require the employee to perform some type of function from home, the advice is that there is no legal obligation on the employer to pay the employee during this period.



40. However, if the employer is in a financial position to pay a portion of the remuneration that the employee would have earned during this period, this will definitely alleviate the pain and it is advisable to do so. It is important to note that it is not required that this payment (and/or benefits) should occur by means of negotiation seeing that, during the impossibility of performance period, the employees are not entitled to any payment and the employer is not entitled to any labour.

E. SOME JOB SECURITY ISSUES

Misconduct

41. If the workplace is open and the employee commits misconduct, the normal misconduct principles are applicable.
42. If the employee is not required to work and commits an employment-related misconduct at home, it is advised that the normal misconduct principles are applicable.

Ill-health

43. In terms of Schedule 8: Code of Good Practice Dismissals (items 10 and 11), an employer must investigate the extent of the illness if the employee is temporarily unable to work.
44. In short, if the illness results in a prolonged absence from work, alternatives to dismissal must be considered, including, obviously, whether or not such illness is due to having contracted the coronavirus.

Operational requirements dismissals

45. It is advised that an employer is entitled to consider such dismissals, due to the impact of the coronavirus, because the considerations could be based on economic, technological, structural or similar needs of the employer.

F. GENERAL IMPORTANT CONSIDERATIONS

46. As always, it is advisable to take note that the answers to the above issues are subject to the specific facts of each matter.
47. It is also advisable to take note that we are currently dealing with 'a moving target' in many aspects and the viewpoints expressed in this opinion may not necessarily be applicable subsequently.

G. AND NOW, WELCOME TO THE SUKUMA RELIEF PROGRAMME APPLICATION CENTRE

48. This is the application platform for financial assistance and aid for small and medium enterprises (SMEs) negatively impacted by the coronavirus.



49. The initiative is in response to the call by President Ramaphosa to all social partners to support SMEs and the Rupert family and Remgro Limited thus pledged R1 billion towards this financial aid. Financial aid for formal sole proprietor.
50. For formal sole proprietors, a non-repayable grant of R25 000 is offered to pay for overheads and the application process is only available online.

Close corporations, companies and trusts

51. The financial aid offered is in the form of an unsecured interest bearing loan of between R250 000 and R1 million, coupled with a non-repayable grant of R25 000.
52. The loan portion will be interest free for 12 months with no repayment obligations during this period.
53. The loan is repayable after 12 months and incurs interest at the prime rate for month 13, once the business is on its feet.
54. The money can be used to cover payment, rental and other monthly operating overheads.

Documents required to participate in the relief fund

55. In essence, the following documents are required for participation in the fund:
- 55.1 annual financial statements for the financial period ended 28 February 2019, signed off by a professional accountant;
- 55.2 management accounts for the period 1 March 2019 until at least 31 December 2019;
- 55.3 the latest available EMP 201 document submitted to SARS, not older than three months;
- 55.4 three months' bank statements of the business for the period 1 December 2019 to 29 February 2020 to assess operations before the lockdown;
- 55.5 a rental (premises statement) not older than three months;
- 55.6 the statements from all other credit agreements, such as asset finance or trade finance loan agreements, as at 31 January 2020;
- 55.7 motivation and supporting documentation clearly illustrating the financial distress suffered by the SME as a result of the coronavirus outbreak;
- 55.8 copies of identity documents of all directors, shareholders, members and trustees as applicable;
- 55.9 copy of marriage certificate, including ANC contract, divorce certificate or death certificate, where applicable;



55.10 copy of registration certificate;

55.11 copy of memorandum of incorporation;

55.12 copy of company's share register; and

55.13 confirmation of bank account details issued by the relevant bank.

Issued on 7 April 2020 by Brian van Zyl, Henk Ungerer and the rest of the *SALLR* team in lockdown, but still kicking like hell

