

EMPLOYER-EMPLOYEE ACTION PLAN ON CORONAVIRUS (COVID-19)

What is the Coronavirus (COVID-19)?

The coronavirus has been defined by the World Health Organisation as, “a large family of viruses that cause illness ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS-CoV) and Severe Acute Respiratory Syndrome (SARS-CoV). A novel coronavirus (nCoV) is a new strain that has not been previously identified in humans.”¹

What are the symptoms of COVID-19?

The 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.²

What are the basic methods of prevention?

Standard recommendations to prevent infection spread include regular hand washing, covering mouth and nose when coughing and sneezing, thoroughly cooking meat and eggs. Avoid close contact with anyone showing symptoms of respiratory illness such as coughing and sneezing.”³

What are the legal counter actions an employer can take?

The coronavirus (COVID-19) is a global health risk that has affected businesses and their operation in South Africa. Recently, there has been alarm on the closure of businesses as patients who test positive to COVID-19 increase on a daily basis. In an effort to protect employees businesses are opting to close. Business closure can either be permanent or temporary.

In the event that the closure is permanent, a retrenchment process would have to commence in accordance to s189 or S189A of the Labour Relations Act 66 of 1995 (amended). Retrenchments are a no-fault dismissal on the part of the employee and in this instance the dismissal would reflect as a dismissal based on operational requirements. During the retrenchment consultation, if an employee is a union member of a registered trade union, the employee may be represented by their trade union. If an employee is non-unionised, an external third party such an attorney or labour consultant may represent them.⁴

¹ <https://www.who.int/health-topics/coronavirus>, accessed on 06/03/2020.

² Ibid.

³ Ibid.

⁴ *Workers Labour Consultants obo Petros Khoza & others vs Zero Appliances cc* (1999, 11 BLLR 1225).

In the event that there is a temporary closure, the employer has a few options and considerations, the following is a practical guide on the frequently asked questions in this regard.

1. Whether or not the employer may place employees on forced leave? How is this to be justified in law? Whether or not the forced leave will be regarded as paid leave or not?

It is not far reached that due to the daily increase in patients testing positive that all public swimming pools, recreational and civic centres, stadiums, libraries, sporting facilities, zoos, restaurants, cinemas and malls amongst others, will be forced to close temporarily. In the unfortunate likelihood of this happening, employers would then have no other option but to place employees on forced leave.

In order to understand whether or not an employer may place an employee on forced leave, one needs to understand the legal principle permitting forced leave. *Force Majeure* is the legal principle in a situation such as the COVID-19 that the employer would base their reason for placing employees on forced leave.

The concept of *force majeure* is rooted in a supervening impossibility of performance. Supervening of performance refers to the situation where performance was possible at the conclusion of the contract but subsequently becomes objectively and permanently or temporarily impossible through no fault of the parties.

The impossibility must be beyond the control of the parties and must be caused by *vis major* or *casus fortuitus*. *Vis major* is an 'act of God' or an irresistible force which includes events such as natural catastrophes, and *casus fortuitus* is a fortuitous or unavoidable accident which no ordinary care or oversight could prevent. It has been said that there is no practical distinction between *vis major* and *casus fortuitus*, which between them include any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight, and unavoidable with reasonable care.

In light of the legal position in South Africa, the coronavirus contains elements of both *vis major* and *casus fortuitus*. It is a pandemic that may be classified as a natural catastrophe which has arisen through natural causes. It can also be said that its effects could not have been reasonably foreseen nor avoidable at the time of contracting. Consequently, the principle of supervening impossibility of performance may very well justify non-performance of a party's obligations under a contract where such non-performance has been caused by the virus, natural component (the virus itself) in cases where performance is of a personal nature,

or practical component (for example, limitations on transportation, closure of industries, quarantines).⁵

In the event that the employer places the employees on leave due to force majeure, such leave will be unpaid leave on the principle of “no work no pay”. The period of such forced unpaid leave would have to be limited as far as possible and be reasonable under the circumstances.

In a statement on 17 March 2020, Employment and Labour Minister Thulas Nxesi stated the following:

- i. In instances where companies decide to close for a short period as a precautionary measure, the short-term Unemployment Insurance Fund benefit will kick in. If a company contemplates a short term shut down, they are required to inform the Unemployment Insurance Fund (UIF).
- ii. In instances where an employee has to be self-quarantined for 14 days, such leave will be recognized as special leave⁶ which will be fully paid on condition that the reason for the quarantine meets the requirements and that the employee can apply for UIF benefits.
- iii. In the event that an employee is required to be quarantined for longer than 14 days as a result of having travelled or been in contact with an infected person, such a leave will be recognized as special leave and that employee will be eligible to apply for unemployment insurance benefits.⁷

Therefore, based on the statement made by Minister Nxesi, in the event that the employer places employees on unpaid leave, employees can claim from the UIF.

2. Whether or not an employee may use annual leave or sick leave?

An employee’s annual leave will be granted in accordance with the provisions of the Basic Conditions of Employment Act (“BCEA”). The employee’s leave entitlement is one (1) working day for every seventeen (17) days which the employee will have worked or was entitled to be paid. This equates to a total of 15 working days per annum.

⁵ David Warmback Coronavirus: A South African Perspective. 27 February 2020, accessed on <https://www.wylie.co.za/articles/coronavirus-a-south-african-perspective/>.

⁶ It is essential to note that in the Basic Conditions of Employment Act no. 75 of 1997 there is no mention of special leave. Nevertheless, special leave is commonly defined as an arrangement granted to an employee who needs to be absent from work during work hours which do not come under other types of leave. This type of leave identifies the need for the absence on the account of unforeseen and important circumstances.

⁷ Minister Thulas Nxesi on impact of Covid-19 Coronavirus at National Economic Development and Labour Council Executive Committee meeting, 17 March 2020, accessed on <https://www.gov.za/speeches/companies-facing-distress-17-mar-2020-0000>.

In terms of section 20(6) of the BCEA an employer must permit an employee, at the employee's written request to take (annual) leave during a period of unpaid leave. This can obviously only be permitted by the employer where the employee has accrued annual leave available.

When it relates to sick leave, it is essential to note that the right to sick leave accrues only when the employee cannot work because of incapacity, which means inability to work owing to sickness or injury. Employees on sick leave must be paid their full salaries.⁸

In the event that an employee intends claiming paid sick leave during the forced unpaid leave period that employee would have to submit to the employer a valid medical certificate declaring the employee ill and booking the employee off sick. Should an employee's sick leave be exhausted, and the employee remains sick, the employee will be subject to unpaid leave.

It is essential for employers to note that the UIF permits employees to claim from the fund in circumstances where they are sick for more than seven days and have exhausted their sick leave. Further should an employee contracts COVID-19 during the course of performing their duties, the employee will be able to claim in terms of the Compensation for Occupational Injuries and Diseases Act⁹ and be compensated in terms of the said Act.

In the event that the employer decides to pay the employees during the period of forced leave without offsetting this against the particular employee's annual or sick leave. The employer will have no claim against the state to recoup such monies.

3. Whether or not a representative trade union must be consulted or informed about the employers to shut down temporarily?

Members of trade unions enjoy the protection of their trade union when it comes to employment related matters. For an employee, it is of importance that the trade union knows of the employer's decisions.

In terms of disclosure, the LRA states that employers have a duty to disclose any information, to trade union representatives, that will allow them to carry out their trade union duties and bargain effectively. The employer has a duty to disclose that production would be shut down for a specific period to ascertain the health and safety of production and ensure that coronavirus will not affect production. The decision to close a facility is one made by management and does not have to be agreed upon by the union. It may however be prudent to at least consult the union and get their input and suggestions before making the final decision.

⁸ John Grogan *Workplace Law*, 12ed (2017) at 50-51.

⁹ No.130 of 1995.

In the event that there is no closure, management should implement a Coronavirus Action Plan. A Coronavirus Action Plan could be implemented in the form of a policy regarding interaction between staff and clients with regard to physical contact when greeting.

The following are a few pointers to management to ensure that the work environment is safe from a health and safety perspective:

- i. Communication must be sent out to all employees, acknowledging the pandemic and disclosing an action plan from management. The action plan must be communicated and placed on notice boards everywhere.
- ii. In terms of the action plan, management needs to ensure that all employees are trained and informed about the hygienic practices that reduce the possible contracting of COVID-19.
- iii. The workplace needs to be hygienic and clean at all times. Management needs to ensure that employees are constantly sanitizing and ensuring that their work space is clean.
- iv. Any employee who has a mild cough or low-grade fever needs to not report to work and must get medical advice.

Another alternative for employers would be to implement a Work from Home Policy stating that employees are expected to produce specific output and be available during working hours. This is essentially also industry specific.

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