



Labour Law Team

Legal Update

1 April 2020

Our Cox Yeats Labour Law Team is committed to keeping you informed on developing legal issues.

PANDEMIC – PANDEMONIUM IN LABOUR LAW

In response to the increasing number of positive corona virus cases in South Africa and the detrimental impact this would have on the nation, on 23 March 2020 President Ramaphosa addressed the nation and declared a national lock-down enacted in terms of the Disaster Management Act effective from midnight on Thursday, 26 March 2020 until midnight Thursday, 16 April 2020.

The President was applauded for taking a bold and decisive step to stop the spread of the virus and act in a manner that would save many lives in South Africa.

Since then the labour and employment fraternity is a buzz because this is uncharted waters. None of our current labour legislation makes any reference to the current situation we find ourselves in. We have been inundated with various Government Notices and press release statements, but, there is still confusion surrounding the employer-employee relationship and this writing by no means clears that confusion but merely sets out the options that may be available and the writer's present opinion on the these topics:

Firstly, an employer needs to ask themselves whether they are involved in providing essential goods or services and whether they have complied with the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002?

If yes, then work ought to continue as normal, however, the employer has an obligation in terms of the Occupational Health and Safety Act to provide and maintain, as far as is reasonably practicable, a working environment that is safe. The employer's obligation depends on the nature of work and what is reasonably practicable under the circumstances.

If an employee contracts the virus during the course and scope of their employment in essential services then the provisions of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) are applicable together with the Notice on Compensation for Occupationally-Acquired Novel Corona Virus Disease (COVID-19) under Department of Labour Notice 193 of 2020.

If an employee refuses to tender their services, without a valid reason, to an employer providing essential services then the usual disciplinary procedures follow.

Secondly, if the employer does not provide an essential service and must comply with the nation-wide lock down, the question that then arises is - how does an employer remunerate employees who are not tendering their services?

The Labour Relations Act and the Basic Conditions of Employment Act regulate the relationship between employer and employee and the conditions of employment respectively. An employee can only be remunerated for services tendered and the harsh reality of the nation-wide lock down is that an employee is not tendering their services through no real fault of their own. Similarly, an employer, through no fault of its own cannot operate. Strictly speaking then according to current labour legislation there is no obligation for employees to be paid. However, since South African labour law is predicated on *fairness*, we ask ourselves whether this is *fair* in the circumstances?

Government initiatives and options available to employers and employees can be summarized as follows:

1. COVID-19-19 Temporary Employee / Employer Relief Scheme (C 19 TERS), 2020 - Department of Labour Notice 215 of 2020

Seeks to assist employers in financial distress and whose closure is directly linked to the COVID-19 pandemic. The closure must be for three (3) months or less. The employer must satisfy the requirements as set out in these regulations and the salary benefits are paid on a sliding scale as set out in the Unemployment Insurance Act to a maximum cap of R17 712 per month.

Employers can also look at the COVID 19 TERS Benefits Easy Aid which sets out the procedure:

http://www.labour.gov.za/DocumentCenter/Publications/Unemployment%20Insurance%20Fund/COVID19%20TERS%20Easy%20Aid_.pdf

2. National Disaster Benefit

Reference to this option is made in *Easy – Aid Guide for Employers*, these were one of the first documents/communications circulating. In terms of this guide an employer may decide, as a direct result from the Corona virus (COVID-19) pandemic to close their business for a period, a temporary lay-off. Under these circumstances an employer may apply for the National Disaster Benefit from the UIF.

Payment of this benefit depends on the accumulated credits available to an employee and will be a flat rate of R3500 per an employee for the duration of the shutdown or a maximum period of three (3) months, whichever period is the shortest.

3. Reduced Working Time – Chapter 3 of the Unemployment Insurance Act

Often referred to as short time and is when an employee loses part of their income whilst being employed. The loss or reduction of their income is as a result of reduced working hours and that employee may claim from the UIF.

The claim is subject to the employee having sufficient credits available calculated by the UIF contributions made by the employer / company.

4. Illness Benefits – Chapter 3 of the Unemployment Insurance Act

“Special leave” under circumstances where an employee self-quarantines due to exposure to the virus. If the employee has to continue self-quarantine for more than 14-days a medical certificate from a medical practitioner must be submitted.

5. Death Benefit – Chapter 3 of the Unemployment Insurance Act

In the unfortunate event of the death of an employee who is a contributor to the fund benefits are paid to dependent beneficiaries of the deceased employee. This is done on application by the relevant dependent beneficiary as set out in the Unemployment Insurance Act.

Thirdly, are these the only options?

Employers have been encouraged to pay employees and to use the above mentioned options available, however, the reality is that the Department of Labour and the UIF are going to be inundated with various applications which is likely to cause a backlog and delay.

Also, employers have been encouraged not to implement unpaid leave and this has been done to promote social solidarity – under the current circumstances one has to agree with this plea. Further, employers have also been encouraged not to “force” employees to take annual paid leave and this is where the opinion differs.

Employees are entitled to annual leave, the minimum of which is set out in the Basic Conditions of Employment Act, employers also implement leave policies to give effect to how leave is administered and when leave should be taken. Most employers require employees to take leave at a time that is operationally convenient.

The view is that employers may require their employees to take annual leave during the period of lock down especially where employees have accumulated a considerable amount of annual leave. Employees may not be required to work during the period of annual leave; therefore, an employer cannot expect an employee to utilize their annual leave and then require them to work remotely from home during this period. There is no prejudice suffered unless an employee does not have any annual leave then it may be negotiated that the employee would be in negative leave until such time that their leave becomes positive. In any event, operationally, most employers may require employees to work back their time in their usual year-end shut down periods and it may not be operationally suitable for employees to take leave in future due to the current down time.

Fourthly, if an employee is able to work, tender their services remotely in a manner does not contravene the nationwide lock down and that employee is able to fulfill their duties in terms of their contract of employment then that employee may be remunerated in the usual manner.

There are various and differing opinions, and this may be read as just another opinion. We can expect ongoing developments with these changing circumstances.

Disclaimer: This is an opinion solely for information purposes and is not intended to provide any reader with legal advice. This version of the opinion reflects the writer's views as of 1 April 2020.

AUTHORED BY : SUNIL HANSJEE, PARTNER



Sunil Hansjee

Partner

Tel: 031 536 8526

Cell: 072 221 3884

Email: shansjee@coxyeats.co.za



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JOHANNESBURG OFFICE:

Tel: 010 0155 800 | Address: 4 Sandown Valley Crescent, Sandton, 2196



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