

COVID-19: THE LOWDOWN ON LOCKDOWN FOR EMPLOYERS

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The nationwide COVID-19 lockdown will affect different types of businesses in different ways and raises a number of employment-related questions.

Some of the key issues that big and small businesses are likely to be debating are whether they are obliged to pay employees throughout the lockdown and whether they can afford to do so.

In the following comprehensive Q&A, we discuss the rights of employers and employees and what relief government is providing to help businesses through the crisis.

To combat the COVID-19 pandemic, the South African government has implemented a nationwide lockdown (under the Disaster Management Act). Unless exempted, everyone will be required to stay at home for the duration of the lockdown.

Regulations have been published that detail how the lockdown will be enforced. Employers considering whether their business operations fall within the category of essential goods and/or essential services should adopt a narrow interpretation, in line with the general purpose of the lockdown.

For employers who are not able to operate, a number of employment considerations arise, particularly relating to remuneration, leave and working from home.

Employers who operate within the essential services categories must take into account various issues, particularly relating to permits for employees, operational adjustments, hygiene measures in the workplace and potential disciplinary issues.

What types of businesses may continue operating?

Those performing essential services, for example health workers,

emergency personnel, security services, and those involved in the delivery of essential services, such as the supply of food and basic goods, banking, maintenance of power, water and telecommunications, laboratories, and medical and hygiene products.

See Annexure 1 for the full list of essential goods and services.

What steps can be taken by the employer to protect its business during lockdown?

Employers that are not involved in the manufacturing, supply or provision of an essential good or service must cease operations unless their business is able to operate remotely. In other words, their employees may work from home, or they may report to the workplace if they are essential for care and maintenance and security. Essential employees must be provided with a permit.

Employers (whether operating an essential service or not) are permitted, in terms of the regulations, to allow employees necessary for the care and maintenance of the workplace to report for duty. Such employees may include cleaning staff and security guards.

What transport is available for those who have to report to work?

All commuter transport is prohibited, except buses, taxis, e-hailing and private motor vehicles, in limited circumstances. Commuter transport services such as taxis may only transport essential services employees during specific times :

- 05h00 – 10h00
- 16h00 – 21h00

Are employers obligated to pay employees during lockdown?

Since this is a government-imposed decision, the "no-work-no-pay principle" may be permissible in law. However, the "no-work-no-pay" principle should be seen as a measure of last resort. Given

the extraordinary circumstances surrounding the lockdown, it is advisable for employers to consider moral and ethical factors, as well as issues around affordability. The employer should also consider the possibility that the lockdown period may be extended if the virus is not contained.

To support a no-work-no-pay decision, employers can rely on one of the contractual principles listed below, depending on the wording of the employment contract:

Force majeure: a clause that protects parties to a contract if an event occurs that is beyond one party's control and prevents that party from performing its contractual obligations. This clause releases that party from its contractual obligations, either temporarily or permanently; or

Supervening impossibility of performance: where there is no *force majeure* clause, the common law principle of supervening impossibility of performance has a similar effect. This principle provides that if a party is prevented from performing his or her contractual obligation as a result of an irresistible force or unforeseeable accident, he or she is discharged from liability for any default.

What are the alternatives to the "no work no pay" principle?

Option 1: Remote working/working from home

This is not a universal option. Various categories of employees cannot work from home because of the nature of their duties. If employees can work remotely, no leave will be applicable. However, the employer must ensure that they are provided with the necessary tools (eg a laptop computer and access to the company network) to do so.

An employer must be careful to avoid any unfairness or discrimination in implementing decisions on which employees can and cannot work from home.

Option 2: Leave

Employers must consider the contract of employment and/or leave policy. Leave arrangements may be agreed in consultation with employees, or the employer may independently decide to put employees on forced leave to avoid the no-work-no-pay principle.

It is important to take into account that, if the spread of COVID-19 is not controlled, the initial lockdown period may be extended.

Various leave alternatives

1. Bring forward the annual shut-down period

This is available to employers who enforce a shut-down period (usually in December) when employees are required to take their annual leave. Employers may be required to consult with employees to reach agreement on this measure, or Section 20(1) of the Basic Conditions of Employment Act may allow an employer to implement an independent decision. This section provides that, annual leave must be taken:

(a) in accordance with an agreement between the employer and employee; or

(b) if there is no agreement in terms of paragraph (a), at a time determined by the employer, in accordance with this section.

The challenge of adopting this measure is that many employees may not have enough annual leave available. In that case, the employer can consider allowing employees to enter into negative leave balances or award special paid leave for the outstanding balance. This is an industry-specific solution as there may be collective (or main) agreements that prevent a single employer from bringing forward the annual shut-down period.

2. Special paid leave

The employer can decide to award special paid leave to employees for the duration of the lockdown, but this may not always be financially viable. Employees will not need to be consulted on this.

Can an employer pay a reduced salary during lockdown?

For the duration of the lockdown, the employer implement a decision to:

- Pay a portion of remuneration;
- Pay basic pay only; or
- Pay an allowance or stipend (with contributions to medical aid, pension fund, etc).

The use of these alternative measures may mean that employees are eligible to apply for certain benefits under the Unemployment Insurance Fund (UIF). UIF benefits are discussed below.

What special steps must be taken by employers who can continue operating during the lockdown?

- Employers must issue employees with a permit in the form prescribed under the regulations.
- Certain adjustments may be needed such as changes to working hours, assisting employees with travel arrangements and closing the canteen.
- Measures to maintain hygiene standards and safeguard the health and wellbeing of employees must be maintained. In particular, the employer must ensure its internal protocols and procedures are followed to prevent or deal with contamination in the workplace. This includes requiring any ill employees to immediately cease reporting for work and to seek medical attention.
- Disciplinary issues may arise such as late-coming, absenteeism or refusing to work in an essential service.

What assistance is available to employers and employees affected by COVID-19 under the UIF and Compensation Fund?

1. UIF

The Temporary Employer-Employee Relief Scheme (TERS), housed under the Unemployment Insurance Fund (UIF), was created to assist employers who have to close operations for up to three months due to COVID-19, and who are unable to pay employees as a direct result.

The Department of Employment and Labour (DEL) has published a directive and a TERS easy-aid-guide for employers describing the rules of the scheme and application process.

Based on information currently available, TERS is available to an employer who has completely closed their operations and the employer is not able to pay the full salaries of its employees for the duration of the lockdown. However, for an employer who has partially closed their operations or is only partially able to pay the salaries of its employees, we would still recommend that such an employer applies for relief from TERS. In addition, employers who are paying employees for the lockdown period (or a part thereof) and seek to recover some of their losses through TERS, should also apply. We have sought clarity from the UIF on these issues and we will keep you updated.

It is important to note that, at this stage, the UIF reserves its right to request financial information to prove that the employer was in financial distress for the duration of the agreement. Employers should consider this prior to applying for relief from TERS, as this may have other commercial and reporting consequences. From time to time, the DEL will also publish important information relating to TERS on its website: www.labour.gov.za.

Reduced Work Time Benefit

The UIF already provides the Reduced Work Time Benefit to qualifying employees in any sector who lose income due to a reduction in working time. This is regulated by section 12(1B) of the Unemployment Insurance Act.

We have received telephonic advice from the DEL that the Reduced Work Time Benefit (under the UIF) will be available to employers who cannot obtain assistance from TERS.

Illness Benefit

The UIF already provides Illness Benefits to qualifying employees. This is regulated by section 12(1)(b), read with Part C, of the Unemployment Insurance Act.

Within the context of Covid-19, the UIF has made available a special Illness Benefit for employees who are quarantined for 14 days or longer. Claiming Illness Benefits through the uFiling system should be followed. The employee must include a confirmation letter, on a company letterhead, signed by the employer and employee, confirming that the employee was placed in precautionary quarantine.

2. Compensation Fund

Under Section 65(1)(b) of the Compensation for Occupational Injuries and Diseases Act, employees are entitled to compensation if they contract a disease (in this case, COVID-19) in the course of their employment. On 20 March 2020, the Compensation Commissioner published a notice on compensation for occupationally-acquired COVID-19, which could arise in the workplace or after official travel to high-risk countries or areas. Assessment of permanent impairment will be determined three months after initial diagnosis. Benefits depend on whether there is temporary or permanent disablement. The Compensation Fund will only accept applications from those with confirmed cases.

Can the employer require an employee to undergo a test for COVID-19?

This is a relevant question for essential service employers and employers who will re-commence operations after the lockdown period.

At all times, the employer must remember its obligation to safeguard the health of its employees whilst they are at work. This obligation must be borne in mind in devising an approach to medical testing of employees for COVID-19.

Medical testing is prohibited under one of the exceptions listed in the Employment Equity Act (EEA) applies. The employer will be able to use one or of the exceptions listed (medical facts, employment conditions, social policy and inherent requirements of the job) to impose a requirement on an employee to undergo a test for COVID-19.

The employer must apply this requirement consistently to ensure fairness and to avoid and claims of victimisation or discrimination by employees. It is also important for the employer to ensure that the for medical testing is both proximate and proportionate to workplace considerations.

What tax relief is available for employers and employees?

The President announced a tax subsidy of up to ZAR 500 per month for the next four months for private sector employees earning below ZAR 6 500 per month, under the Employment Tax Incentive.

SARS will also work towards accelerating the payment of employment tax incentive reimbursements from twice a year to monthly to assist employers. Tax-compliant businesses with a turnover of less than ZAR 50 million will be allowed to delay 20% of their pay-as-you-earn liabilities over the next four months and a portion of their provisional corporate income tax payments without penalties or interest over the next six months.

What pension fund relief is available for employers and employees?

The Financial Sector Conduct Authority (FSCA) has acknowledged that the COVID-19 crisis may mean that employers and employees are not able to pay contributions to pension funds (as per Section 13A of the Pension Fund Act).

The FSCA has encouraged boards of funds to apply the relevant rules (or create new rules) to assist employers and employees with a suspension or reduction of contribution payments during the COVID-19 crisis. Most funds have rules which allow for adjustments to contribution payments in specific instances, for example:

- Temporary absence from work (with or without pay);
- A break in service (where an employee is not working); or
- Postponement of contribution payments (where an employee is working reduced hours).

The FSCA has requested boards of funds to consider their rules to see whether it is possible to assist employers with a suspension or reduction of contribution payments. If such rules do not exist, the boards of funds are permitted to create new rules and submit the necessary rule amendments to the FSCA.

What considerations should the employer bear in mind in preparing for a full return to the workplace?

Employers can already start planning for a return to the workplace. The following considerations are important:

- Preparing the workplace for return (ie ensuring that the necessary health and safety controls remain in place);
- Maintaining travel restrictions (particularly international travel) until COVID-19 is contained around the world;
- Providing leave to employees in instances where the employee may need to be quarantined or isolated due to being exposed to the virus or displaying symptoms; and
- Requiring employees to consult a medical practitioner or undergo medical testing if they display symptoms of the virus.

Can an employer retrench staff as a result of the lockdown?

There is no doubt that there are a number of employers who may be concerned about their future financial sustainability due to the lockdown. Employers may contemplate the possibility of retrenching staff during or after the lockdown period. However, given the unprecedented nature of the Covid-19 crisis, employers are well advised to consider the various alternative options currently

available (eg submitting an application for relief under TERS) prior to entering into retrenchment procedures. The government has introduced various measures to assist employers in avoiding retrenchments during this time. Details of these measures are contained in this note. Instead of engaging in retrenchment procedures, employers should consider alternative measures and then engage with their employees on the use of such measures in an effort to avoid retrenchments.

Employers who nevertheless elect to embark on retrenchment procedures must satisfy the requirements under section 189 of the LRA. One of the requirements relates to the obligation to consult employees on possible retrenchment. This requirement is triggered as soon as the employer contemplates dismissal for operational requirements. The employer may face logistical challenges in consulting with employees during the lockdown period (as such consultations will need to happen using technology). Further, it must be noted that if the retrenchment involves 50 or more employees and a facilitation is requested by one of the parties, such facilitation will not be possible as the CCMA is not fully operational during the lockdown period.

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A. ESSENTIAL GOODS

1. Food
 - (i) Any food product, including non-alcoholic beverages;
 - (ii) Animal food; and
 - (iii) Chemicals, packaging and ancillary products used in the production of any food product.
2. Cleaning and Hygiene Products
 - (i) Toilet paper, sanitary pads, sanitary tampons, condoms;
 - (ii) Hand sanitiser, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment;
 - (iii) Chemicals, packaging and ancillary products used in the production of any of the above;
 - (iv) Products for the care of babies and toddlers;
 - (v) Personal toiletries, including haircare, body and face washes, roll-ons, deodorants, toothpaste.
3. Medical
 - (i) Medical and Hospital Supplies, medicine, equipment and personal protective equipment;
 - (ii) Chemicals, packaging and ancillary products used in the production of any of the above.
4. Fuel, including coal, wood and gas
5. Basic goods, including airtime, electricity and withdrawal of cash.

B. ESSENTIAL SERVICES

Categories of essential services are confined to the following services:

1. Medical, health (including mental health), laboratory and medical services and the National Institute of Communicable Diseases;
2. Disaster management, fire prevention, fire fighting and emergency services;
- 3.1 (a) The following services necessary to maintain the functioning of a financial system as defined in section 1(1) of the Financial Sector Regulation Act, only when the operation of a place of business or entity is necessary to continue to perform those services:
 - (i) the banking environment (including the operations of mutual banks, cooperative banks, co-operative financial institutions and the Postbank);
 - (ii) the payments environment;
 - (iii) the financial markets (including market infrastructures licensed under the Financial Markets Act, 2012 (Act No. 19 of 2012);
 - (iv) the insurance environment;
 - (v) the savings and investment environment;
 - (vi) pension fund administration;
 - (vii) outsourced administration;
 - (viii) medical schemes administration; and
 - (ix) additional services designated in terms of regulation 11B(4A)(c)(i).
- (b) The services listed in paragraph (a) may not be construed to include debt collection services.
- 3.2 Services necessary for the provision of social grants designated in terms of regulation 11B(4A)(c)(ii).
4. Production and sale of the goods listed in 'A', above;
5. Grocery store and wholesale produce markets, including spaza shops and informal food traders; with written permission from the municipal authority to operate being required in respect of informal food traders;
6. Electricity, (including vital demand management services), water, gas and fuel production, supply and maintenance; .
7. Critical jobs for essential government services as determined by Head of National or Provincial Departments in accordance with the

- guidance of the Department of Public Service and Administration, including Social Grant Payments and pension payments;
8. Birth and death certificates, and replacement identification documents;
9. Essential municipal services;
10. Care services and social relief of distress provided to older persons, mentally ill, persons with disabilities, the sick, and children;
11. Funeral services, including mortuaries;
12. Wildlife management, anti-poaching, animal care and veterinary services;
13. Newspaper, broadcasting and telecommunication infrastructure and services, including call centres critical for the support of such services;
14. Production and sale of any chemicals, hygiene products, pharmaceuticals for the medical or retail sector;
15. Cleaning, sanitation, pest control, sewerage, waste and refuse removal services;
16. Services related to the essential functioning of courts, judicial officers, the Master of the High Court, Sheriffs and legal practitioners required for those services;
17. Essential SARS services defined by the Commissioner of SARS;
18. Police, peace officers, traffic officers, military medical personnel and soldiers, correctional services officials and traffic management services;
19. Postal services and courier services related to transport of medical products;
20. Private security services;
21. Air-traffic Navigation, Civil Aviation Authority, air charters, Cargo Shipping and dockyard services;
22. Gold, gold refinery, coal and essential mining;
23. Accommodation used for persons rendering essential services, quarantine, isolation and the lockdown;
24. Production, manufacturing, supply, logistics, transport, delivery, critical maintenance and repair in relation to the rendering of essential services including components and equipment;
25. Transport services for persons rendering essential services and goods, and transportation of patients;
26. Services rendered by the Executive, members of Parliament, Members of the Provincial Legislature, members of Local Councils, the Judiciary, traditional leaders and National Office Bearers of Political Parties represented in Parliament;
27. Commissioners of the South African Human Rights Commission, Gender Commission, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Public Protector and Deputy Public Protector;
28. Transport and logistics in respect of cargo and goods as set out in Part A to neighbouring countries;
29. Tow trucks and vehicle recovery services;
30. Call centers necessary to provide health, safety, social support, government and financial services;
31. Harvesting and storage activities essential to prevent the waste of primary agricultural goods;
32. Implementation of payroll systems to the extent that such arrangements have not been made for the lockdown, to ensure timeous payments to workers; and
33. Critical maintenance services which cannot be deployed for more than 21 days and are essential to resume operations after the lockdown.