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Q&A ON COVID-19 EMPLOYMENT ISSUES

Special Interest Articles:

- Quick employment guide to lockdown rules
 - Working from home, forced leave and salary
 - Information on the revised directive that regulates TERS benefits
 - The employer's accounting obligations
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On 5 March 2020, the South African Minister of Health confirmed the first case of COVID-19, also known as the corona virus in South Africa. The spread of the pandemic is forcing employers to re-examine their strategies to help stop the spread of the virus, survive and move forward.

Below, we unpack some of the discussions by lawyers from various law firms on the rights and obligations owing by employers and employees during this time

First things first: What about the employment contract?

In a radio interview with Heart FM, Hugo Pienaar, Director in the Cliffe Dekker Hofmeyr Inc. Employment Law practice, highlighted some of the major implications on employment contracts caused by the pandemic. Essentially, the pandemic has invoked the principles of *vis major* (act of God) or supervening impossibility.

Thus, and as a result of the lockdown, an employee cannot render his or her services and the employer cannot accept such services. Therefore, the basis of the contract of employment has fallen away. This essentially means that the employee is relieved from rendering services and the employer is in principle relieved from paying remuneration or salaries during this period.

Therefore, the shutdown has suspended the relationship in the sense of obligations in terms of pay and rendering services in instances where the business or company is in total lock down.

Quick Employment Guide to the lockdown rules¹

If an employee is employed by a company or a division of a company that provides essential goods or essential services, the employee is obliged to continue working during the lockdown.

If an employer does not provide essential goods or services then it cannot legally force an employee to work during the lockdown. However, there are two exceptions to this:

the employer can require certain employees (particularly those who perform work related to care and maintenance at the workplace) to report for duty; and

employees who are able to work from home may also be required to continue working during the lockdown period. This is permissible under the regulations.

An employee cannot be dismissed for not reporting to work during the lockdown period.

An employer may legally implement the no-work-no-pay principle during the lockdown. However, whether or not this can be implemented in each employer-employee relationship depends on the terms of the employment contract.

If an employer has implemented this principle it is advisable to confirm the wording of the contract. If a *force majeure* (act of God) clause exists, it is likely that the employer is able to implement this principle. If not, the common law principle of impossibility of performance can come into play, which means that the employer can still legally implement no-work-no-pay.

¹ All information sourced from Ground Up article 'Covid-19: What are your rights as an employee?' (7 April 2020) written by Shane Johnson and Samantha Robb <https://www.groundup.org.za/article/covid-19-knowing-your-rights-employee/>

Working from home, forced leave and salary reductions

In his interview with Herat FM, Pienaar further stated that in instances where the Employees work remotely from home, the employer can apportion their salaries and can pay a reduced salary to the employees, and may also invoke the employees' annual leave during the lockdown period unilaterally should the employee not agree to taking the leave.

Government assistance: Who can apply?

If an employer and its employees do not fall under the essential services or goods category, and the business is unable to continue operating during the lockdown, government has set up assistance for both employees and employers. Some of these measures may also apply to essential services employees.

The Unemployment Insurance Fund (UIF) has introduced the Temporary Employer-Employee Relief Scheme (TERS) for employers who are financially distressed and unable to pay salaries of employees during the Covid-19 crisis.

TERS is available to employers who are required to close their operations for a period of three months (or less).

Only employers may apply to the Department of Employment and Labour for TERS support, for themselves and their employees.

Government's financial relief scheme and their job

The Department of Labour has published a new directive around its Covid-19 for South African businesses.

Due to Covid-19 employees may be laid off temporarily and not paid, either fully or in part. Whilst employers are encouraged to pay employees during this period they are not obliged to do so.

Where it is not economically possible for employers to pay employees, either fully or at all, a special benefit fund has been set up under the auspices of the Unemployment Insurance Fund (UIF) – the TERS.

More information on the revised directive that regulates TERS benefits²

As mentioned above, a new directive regulating the benefits under TERS has been published. Below, law firm Bowmans³ outlined what the new directive means, what is expected to be contained in the revised memorandum of agreement, and how the TERS works.

²All information sourced from Business Tech article 'New rules around financial relief for employees in South Africa – here's everything you need to know' (9 April 2020) <https://businesstech.co.za/news/finance/388669/new-rules-around-financial-relief-for-employees-in-south-africa-heres-everything-you-need-to-know/>

³Article 'COVID-19: South African TERS Benefit – What You Need to Know' written by Talita Loubser (8 April 2020) <https://www.bowmanslaw.com/insights/employment/covid-19-south-african-TERS-benefit-what-you-need-to-know/>.

Who can claim?

- An employer who contributes to the Unemployment Insurance Fund (UIF);
- The employer must have closed its operations, or part of its operations, as a direct result of the Covid-19 pandemic, for a period of three months or less;
- The size of the employer's workforce does not matter, although special provisions of the Memorandum of Agreement apply to employers with fewer than 10 employees;
- The employee must have been in the employer's employ on 27 March 2020, and must have suffered, or will suffer, a loss of income as a result of the closure;
- The benefit may only cover the cost of salaries during the closure – it may not be used for other purposes.

What is the value of the benefit?

The benefit is determined with reference to a sliding scale and employees may get a percentage of their salary (between 38% and 60%).

For purposes of this calculation, the relevant salary amount is the maximum of R17,712 per month, per employee. Therefore:

- If an employee's salary is more than the maximum threshold amount of R17,712 – for example, R20,000 – the employee would not receive a percentage of R20,000, but would receive 38% of the threshold amount of R17,712. The maximum amount of the Covid-19 TERS monthly payment will therefore be R6,730.
- If an employee's salary is less than the threshold amount – for example R15,000 – the employee would receive a percentage of her/ his salary of R15,000. The exact percentage that they would receive, will be determined in accordance with the UIF calculator. The calculator is soon to be found on the UIF website.

The minimum amount of the benefit is R3,500 regardless of the minimum wage as prescribed by the applicable sectoral determination/ collective agreement.

Employers may supplement these benefits, but employees may not get their full salary plus the benefit. The maximum that an employee may accordingly receive (from the UIF and their employer) is 100% of her/ his salary.

What if the employer paid the employee? Can the employer still claim the benefit?

Yes. The employer may claim the benefit and may retain the value of the benefit already paid to the employee.

To avoid disputes, Bowmans recommends that the employee's payslip reflects 'TERS Benefit' (in the event that the employee is paid the value of the benefit) or 'Includes TERS Benefit' (if the employee is paid an amount higher than the TERS benefit).

Who will pay the benefit?

If the employer has concluded a Memorandum of Agreement with the UIF, or if the employer has accepted the UIF's standard terms and conditions, the value of the benefit in respect of the employer's employees will be paid to the employer. The employer must then pay over the benefit to the employees concerned (except where they have already been paid) within two days (see below).

If the employer is a member of a bargaining council that has concluded a Memorandum of Agreement with the UIF, the UIF will pay the amount to the bargaining council, and the bargaining council will administer the payments to the employees.

Employees will therefore not be paid by the UIF directly, but by their employer or the applicable bargaining council. The only exception to this is where an employer employs fewer than 10 employees.

The UIF will first verify the supporting documents submitted by the employer and, within 10 business days of the employer submitting all of the required documents and information, will deposit the funds into the employer's business account.

Employers must pay their employees the benefit within two days of receiving payment from the UIF. If the employer has already paid their employees part or all of the benefit amount, the employer can recover those amounts from the funds deposited by the UIF and pay the balance - if applicable - to the employees within two days. Employers must submit proof of payment to the UIF within five days of the payment by the UIF and return any funds not used (including interest) to the UIF within 10 days of its business operations recommencing.

Will the benefit be paid in one lump sum?

The UIF will pay benefit funds in relation to three separate time periods: first for the period of temporary closure for 30 days from the date of lockdown; second for any period of temporary closure during the following 30 days; and third, for any period of temporary closure during the balance of the Memorandum of Agreement. The Agreement is in force for three months from the date of confirmation by the UIF that it accepts the employer's COVID-19 TERS application.

What must the employer do to claim?

The employer must apply by reporting the total or partial closure to **covid19ters@labour.gov.za**.

The employer will receive an automatic response outlining the application process and the documents and information that is required.

The required documents will include:

- A letter of authority from the employer;
- The signed Memorandum of Agreement, or electronic acceptance of the standard terms;
- The UIF's template which includes details of the employer, the period of closure, the list of employees and their dates of employment and ID numbers, the remuneration received by the employees;
- Proof of remuneration to employees for the previous three months; and
- Confirmation of employer bank account.

What about employers who employ fewer than 10 employees?

Employers with fewer than 10 employees must submit the individual bank account details of each of the employees to the UIF. The UIF will pay these employees directly.

What are the employer's accounting obligations?

- Employers must keep all their accounting records relating to the Memorandum of Agreement and the COVID-19 benefit for five years, and keep them separate from accounting records relating to its business. This will enable them to be identified on a standalone basis from the business-related accounting records.
- Employers must keep a proper audit trail of the UIF funds received and benefits paid to employees.
- Employers may not withdraw the funds paid by the UIF, or draw any cheques from the funds.
- The UIF may appoint an auditor or investigator to audit the employer's implementation of the Memorandum of Agreement.

Is the information submitted to the UIF confidential?

Yes, the information submitted by the employer and employees must be kept confidential, unless it needs to be disclosed to a third party in order for the Memorandum of Agreement to be implemented.

What happens if there is a dispute?

- The first step is for senior officials of the UIF and the employer to meet to attempt to resolve the dispute amicably.
- If that does not resolve the dispute, either of the parties may refer the dispute to the Arbitration Foundation of South Africa, which arbitration will include the right of appeal.
- Both employers and employees are currently finding themselves in uncharted territory, and how the relationship between them will unfold in the next few months cannot be predicted and will most certainly be tried and tested by various forms of regulations as well as the common law.

* Disclaimer: This article does not constitute a legal opinion or legal advice and is a summary of the various articles researched on this topic. Anyone seeking legal advice on the implications of the Labour Relations Act and the Regulations issued during the Covid-19 pandemic is advised to consult an independent labour practitioner. Annemarie Swanepoel Attorneys shall not be held liable for any actions taken pursuant to the publication of this article.