



NAVIGATING UNCHARTED TERRITORIES

DOES AN EMPLOYER HAVE AN OBLIGATION TO REMUNERATE EMPLOYEES DURING THE COVID-19 LOCKDOWN?

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INTRODUCTION

The coronavirus outbreak continues to spread rapidly throughout South Africa, posing serious threats to both lives and livelihoods. The pandemic has upended the lives of many South Africans and while the government has implemented several measures to effectively respond to, contain and curb the spread of the virus, the pandemic's effect on the economy, businesses and individuals is still a challenging reality.

The COVID-19 lockdown was declared from midnight on 26 March 2020 and has caused serious anxiety for both employers and employees. The world of work has been tasked with navigating a myriad of uncertainties for the immediate future, including the rights and obligations of employers and employees during these uncertain times.

This article will briefly explore whether employers have an obligation to pay their employees' salaries and wages during the COVID-19 lockdown period.

ARE EMPLOYERS OBLIGATED TO REMUNERATE THEIR EMPLOYEES?

It is standard practice for employment contracts to contain a "no work, no pay" clause. The lockdown has left employees grappling with whether or not they will be paid during this period. Employers on the other hand are placed in a legal conundrum, trying to ascertain whether they have a legal obligation to pay salaries and wages,

notwithstanding the fact that their employees have not rendered any services, or have rendered limited services during the course of the lockdown period.

Employment relationships are based on the premise that an employee renders services to the employer and the employer remunerates the employee for the services rendered.

The Basic Conditions of Employment Act (75 of 1997, as amended) ("BCEA") defines "wage" and "remuneration" respectively as: "the amount of money paid or payable to an employee in respect of ordinary hours of work or if they are shorter, the hours an employee ordinarily works in a day or week." and "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person".

According to these definitions and the fact that no "hours of work" would have taken place during the lockdown period, the employer is under no legal obligation to pay salaries or wages to employees owing to the employee's remuneration being commensurate to the number of hours worked.

TEMPORARY EMPLOYER/EMPLOYEE RELIEF SCHEME ("TERS")

Notwithstanding the above, the directive issued by the Presidency encourages employers to pay their employees a salary or wage during the lockdown period,

despite the fact that the employees have not been able to render services.

Employers who are willing to comply with the directive can receive assistance from the Department of Employment and Labour (“the Department”) which has set up the TERS to assist employers with the remuneration of their employees. This relief scheme is aimed at assisting employers who may close their entire business operations or part thereof for a period of 3 months or less. In terms of the directive, the employees may be laid off temporarily and may not be paid, either fully or in part, during the lockdown period.

In terms of the directive, “*temporary lay-off*” means “*a reduction in work following temporary closure of business operations, whether total or partial, due to the Covid-19 pandemic for the period of the National Disaster.*” Since TERS is administered through the Unemployment Insurance Fund (“UIF”), the employer must have been contributing to the UIF on behalf of its employees. The employer makes the application on behalf of the employees, in terms of the application procedure and guidelines as provided in the directive.

It may prove useful to distinguish claiming in terms of the UIF and TERS. Where the employer has permanently closed its business operations, resulting in the employees being unemployed, they may claim UIF benefits. TERS may be claimed where an employer has implemented temporary lay-offs.

WHAT HAPPENS TO THE EMPLOYMENT RELATIONSHIP?

The principle of “*supervening impossibility of performance*” applies to the temporary lay-off. That is, both parties are discharged of their contractual obligations and subsequently not obliged to render their services. The employer is unable to perform his contractual obligation of paying the employees’ salary or

wages due to factors beyond its control and on the other hand, the employee is also unable to perform its obligation of rendering services to the employer due to factors beyond their control. The supervening impossibility in this case being the COVID-19 lockdown.

Under the common law, the normal consequence of supervening impossibility of performance results in the termination of the contract. However, in this case, the employment relationship subsists.

The directive makes provision for a blanket protection of all employment contracts by ensuring that the supervening impossibility of performance does not result in the termination of the contract. Instead, the obligations are merely suspended for the period of the supervening impossibility of performance or the COVID-19 lockdown period.

CONCLUSION

The employment contract is based upon the premise that an employee renders services and the employer remunerates them for the services rendered. The BCEA defines wages and salary in a way that is consistent with the above. The effect is that where there is no work rendered, there exists no legal obligation on employers to remunerate their employees. Of course, where there is work being done from home, the employee is entitled to remuneration for their services.

The directive issued by the Presidency merely encourages employers, to the extent that it is reasonably possible, to pay their employees’ salaries and wages during the lockdown. Any gesture from the employer is from a moral point of view and the financial ability to do so.

It is undeniable that COVID-19 is disrupting people’s lives and livelihood and obliging everyone to enter unchartered waters and swim!

Sources referenced in this article:

1. Basic Conditions of Employment Act 75 of 1997.
2. Government Directive: COVID-19 Temporary Employee / Employer Relief Scheme (25 March 2020).
3. Government Directive: Amended COVID-19 Temporary Employee / Employer Relief Scheme (8 April 2020).
4. S Milo & N Froneman, “Rights and obligations of employers and employees” (2020) *GoLegal*. Available online at <https://www.golegal.co.za/coronavirus-work-rights/> and accessed on 15 April 2020.

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