

Coronavirus – employment rights

1. What is an employee's sick leave entitlement?

The Basic Conditions of Employment Act 75 of 1997 (BCEA) regulates sick leave entitlement. In terms of section 22 of the BCEA, the “sick leave cycle” means the period of 36 months' employment with the same employer immediately following an employee's commencement of employment. During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks. Usually (for an employee who works five days a week) this equates to 30 days' sick leave per 36 months of employment.

2. Must an employee be paid for sick leave?

Subject to section 23 of the BCEA, an employer must pay an employee for sick leave: a) the wage the employee would ordinarily have received for work on that day; and b) on the employee's usual pay day.

3. When is an employer not required to pay sick leave?

In terms of section 23 of the BCEA, an employer is not required to pay an employee for sick leave if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

4. What are the basic requirements for the medical certificate?

The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council.

5. What if sick leave is exhausted?

An employer is not required to pay employees for sick leave taken when the sick leave entitlement has been exhausted. However, we recommend that authorised unpaid leave be considered. In those instances, the employee must claim illness benefits in terms of the Unemployment Insurance Act 63 of 2001 (UIA). In terms of section 20 of the UIA, a contributor is entitled to the illness benefits contemplated in the UIA for any period of illness if, inter alia, the contributor is unable to perform work on account of illness.

6. When can an employee be dismissed due to the Coronavirus?

In terms of Schedule 8: Code of Good Practice Dismissals, an employer must investigate the extent of the illness if the employee is temporarily unable to work. If the illness may result in a prolonged absence from work, alternatives to a dismissal must first be considered. The factors to take into account in considering alternatives to dismissal include, the seriousness of the illness, the period of absence, the nature of the employee's job and whether a temporary replacement may be secured. During this process, the ill employee should be given an opportunity to make recommendations as well. Only once all these processes have been followed and no alternative to dismissal found, may an employer consider dismissal.

7. May employers consider retrenchments due to the impact of the Coronavirus?

Section 189 of the Labour Relations Act 66 of 1995 applies if an employer contemplates dismissing one or more of its employees for reasons based on its operational requirements. “Operational requirements” is defined as requirements based on the economic, technological, structural or similar needs of the employer.

A retrenchment is as a result of no fault on the part of the employee. In the circumstances, it is not an opportunity for an employer to terminate the employment of ill employees. At this point, the Coronavirus is unlikely to trigger an operational need. The recommended period for recovery/isolation is 14 days – this in itself cannot trigger a need to retrench. However, should a large number of employees be infected, an operational need could possibly arise in future.

8. What can be done about employees who refuse to come to work?

Employees remain obligated to come to work, unless instructed otherwise by their employers. Employees who refuse to come to work must have a valid reason for their absence. The mere presence of the Coronavirus in South Africa does not constitute a valid reason to stay away from work. Employees who stay away from work without a valid reason, may face disciplinary action. We encourage employees to rather speak to their employers about their concerns before making a decision to stay at home, without authorisation.

9. Do employees have the right to work from home?

Employees do not have a right to work from home. Working from home may be considered by employers but should not be implemented by employees without the employer's consent. We encourage employees to rather speak to their employers about their concerns.

10. May employees be required to work from home?

Yes. Working from home may be permitted in the discretion of the employer. This is not always viable but could be considered in a corporate environment. Should employers consider this option, we recommend that clear guidelines be set for employees. This may include that the working environment must be safe, the employee must have a secure telephone line and Wi-Fi connection and employees should remain within travelling distance of the office.

11. May an employee's professional or personal travel plans be restricted?

Professional travel plans may be changed or prohibited. However, an employer does not have the right to dictate whether an employee may travel during his/her annual leave or weekends. Employers may, however, require their employees to disclose if they have travelled to any specific locations in order for the employer to assess the risk to other employees or customers.

12. As an employer, what are my obligations?

The Occupational Health and Safety Act 85 of 1993 (OHSA), requires an employer to bring about and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of its employees. For this reason, we recommend that employers adopt

contingency plans and communicate with its employees regarding the measures it will adopt in securing the workplace.

This may include:

- the prohibition of handshakes or physical contact;
- limitation on meetings;
- sufficient supply of hand sanitizer; or
- requiring employees to work from home, should they feel sick in any way.
- It may also be necessary to relax the sick leave policy or to permit more flexibility in working arrangements.

13. As an employee, what are my obligations?

The employee and the employer share the responsibility for health in the workplace. Therefore both the employee and employer must pro-actively identify dangers and develop control measures to make the workplace safe. For this reason, employees should abide by any policies adopted by the employer to curb the spread of the Coronavirus. Employees should also inform their employer if they are aware of any risk to the health of their colleagues.

14. Practical Tips

The following practical tips may be considered:

- 14.1 The prohibition of unnecessary meetings and the increased use of video conferencing facilities.
- 14.2 The prohibition of any form of physical contact, specifically hugs and handshakes.
- 14.3 Requiring employees to report to their manager if they feel unwell in order to possibly allow that employee to work from home.
- 14.4 Requiring employees to disclose if they have travelled to a high-risk area recently.
- 14.5 A rule that requires employees to wash their hands regularly.

Corona virus spreads through:

- coughing or sneezing;
- close personal contact; and
- touching an object or surface on which the virus is found.

15. Can employees wear a face mask to work?

Unlike industries such as mining and firefighting where protective clothing is a requirement, employers are not legally obliged to provide masks.

Therefore, wearing face masks to work would be at the employer's discretion and informed by its risk to exposure to the virus.

What we know so far:

- as of Tuesday 10 March 2020, 3,642 people have been tested for the virus in South Africa;
- the total number of coronavirus cases in South Africa is now at 13;
- all 13 cases in the country have been diagnosed in patients who have travelled out of South Africa and have returned to the country with the virus;
- thus far, there have been no reported internal transmissions;
- the number of people the 13 patients have come into contact with has been a mere estimation; and
- the regions in which the patients have been diagnosed are Gauteng, Kwa-Zulu Natal and the Western Cape.

Despite the absence of reported internal transmissions, precautionary measures still need to be put in place especially in the workplace where employees are susceptible to contracting to virus due to close contact with other employees and clients.

Safeguarding the workplace from COVID-19: The legal obligations of employers and employees in light of South Africa's first coronavirus case

On Thursday, 5 March 2020, Health Minister Dr Zweli Mkhize confirmed South Africa's first positive case of the coronavirus disease (Covid-19).

Covid-19 is a highly-transmittable virus that spreads through respiratory droplets produced when an infected person coughs or sneezes and between people in close contact. Countries already infected have discouraged or prohibited collective gatherings at venues such as movie theatres, schools, universities and even places of worship.

While South Africa's Department of Health has advised the public on certain precautionary measures that may be taken, it has not issued specific directives for employers managing the health and safety of their employees, customers, business partners and suppliers who may often be required to work in close proximity.

As Covid-19 continues to spread, it is imperative that South African employers and their employees work together to safeguard their health and safety.

Legal obligations of employers

Section 8 of the Occupational Health and Safety Act, 1993 (OHSA)

requires every employer to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risks to the health of its employees.

This duty includes (i) taking steps to eliminate or mitigate any hazard or potential hazard, before resorting to personal protective equipment; (ii) providing information, instructions, training and supervision that may be necessary to ensure the health and safety of employees at work; and (iii) enforcing such measures as may be necessary in the interests of health and safety. Section 9 extends these duties towards persons other than those in employment affected by the employer's activities.

The General Safety Regulations published under the OHS Act prohibit an employer from permitting a person to enter a workplace where the health and safety of such person is at risk.

Employers may accordingly impose rules on their employees in order to ensure a safe working environment and, in addition, it may place conditions on entry into its premises. Employers may exclude persons from their premises if they do not abide by those rules. It is on this basis that entry to building sites may be subject to the wearing of hard hats and other protective clothing.

In light of Covid-19, a legitimate entry requirement may be requiring the disclosure of recent international travel and subjecting individuals to a temperature test, if necessary. Any such test must be conducted with due regard to the individual's privacy and the

individual's informed consent should first be obtained. The temperature test itself should be as un-invasive as possible, and screeners as opposed to thermometers placed in the ear or mouth, are advisable.

If an individual refuses to be subjected to a temperature test, the employer may rely on other available information, such as persistent coughing or sneezing, and must then take appropriate measures.

The Environmental Regulations issued in terms of the OHS Act provide, *inter alia*, that the employer must ensure that its workplace premises are ventilated in such a way that the air breathed by the employees does not endanger their safety.

Where there is a danger of unsafe air (in the case of Covid-19 infected respiratory droplets), the employer must provide the employees (and must ensure that they correctly use) respiratory protective equipment of a type that reduces exposure.

Businesses are therefore required to ensure that the air-conditioning systems at their premises do not expose the employees to the risk of infection.

Further, the Facilities Regulations require employers to provide (free of charge) sanitary facilities, soap or a similar cleansing agent as well as hot and cold water. The employer is also required to maintain rooms and facilities that are clean and hygienic. Door handles,

surfaces, and computer keyboards should be given particular attention and be wiped/ cleaned regularly.

Currently, employers do not have any reporting obligations to the Government in respect of a suspected case of Covid-19 infection.

Legal obligations of employees

The OHSA also imposes a duty on employees to take reasonable care for their own health and safety and that of other persons who may be affected in the workplace. Employees who act in violation of an employer's health and safety rules or who disobey reasonable and lawful instructions in this regard may be subjected to appropriate disciplinary action. Blatant disregard for such rules or instructions could potentially be grounds for dismissal on the basis of misconduct.

If an employee becomes aware of a situation that is unsafe or unhealthy, s/he must report such a situation to the employer as soon as practicable. In the context of Covid-19, this may include a suspicion that a fellow-employee or customer/ client exhibits flu-like symptoms or is running a fever. The employer should then take appropriate steps, such as requesting the individual concerned to submit to a temperature test, and to require the person concerned to leave the premises if need be. Again, such testing may only be conducted with the individual's informed consent.

Pedantic or negligent

The OHSA provides general obligations, and the specific steps that an employer may be required to take in order to ensure health and safety would depend on the particular circumstances of the workplace concerned.

It is important to remember that 'reasonably practicable' measures must be taken. A proper assessment of what would be reasonably practicable must be made. If taken too far, such measures could be challenged on the basis of being unreasonable or inappropriate; but, if not taken when necessary to safeguard the health and safety of the workplace, an employer may be found to be negligent and liable for the consequences.

The Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) protects the employer from delictual liability in respect of employees who contract an illness during the course and scope of her/ his employment. An employee who contracts an occupational disease can claim from the Compensation Fund without having to prove the employer's negligence.

However, if the employer was in fact negligent, the employee may receive increased compensation and the cost of such increased compensation may be passed on to the employer in the form of increased assessment rates.

COIDA also only protects employers against claims arising out of injuries or diseases contracted by their employees in the course and

scope of employment. Customers or clients who contract a disease due to their interaction with the workplace would have to institute a civil claim, and the normal delictual principles will apply.

Employers will need to strike the correct balance in implementing measures that are appropriate for managing the health and safety of the workplace.

Covid-19 has officially reached South Africa and employers and employees should be prepared by fully understanding their obligations to protect themselves and others from exposure and prevent further infection.

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