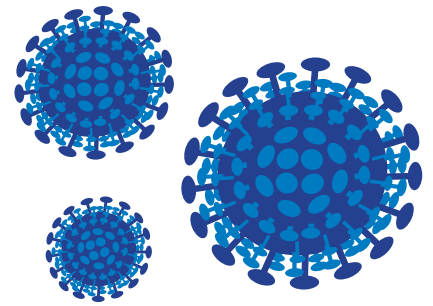


# Employment Survival Guide

Know your employment rights

# Employment Survival Guide

Know your employment rights



## SHUTDOWN! What about employees? Options below

### Annual Leave



Employees may be asked to use their annual leave during this time. This only applies to the statutory portion of annual leave (i.e. 15 business days).

Statutory annual leave is regulated by the BCEA. Section 20 sets out the framework for statutory annual leave. An employer must grant statutory annual leave in accordance with an agreement between the parties. In the absence of an agreement the employer may determine the time for statutory annual leave to be taken. When an employer wishes to send employees home on statutory annual leave to keep them away from the office during a pandemic such as this, it may determine the time for them to take statutory annual leave.

### Temporary Employee Relief Scheme



In terms of the TERS process, the UIF may fund the distressed companies directly in relation to the TERS Allowance.

It allows for three types of relief:

- Wage subsidy;
- Wage subsidy and training; and
- Turnaround solution.

The distressed company will only be funded if it meets the key requirements of the UIF which includes that the distressed company is able to demonstrate that it will/or has embarked upon a turnaround or sustainability programme which will result in job preservation at the expiry of the funding agreement.

### Disaster Management Fund



The employer may decide, as a direct result from the current Coronavirus (COVID-19) pandemic to close their business for a period and send employees home. This constitutes a temporary lay-off. If the employer cannot pay employees for this period, the employer can apply for the "National Disaster Benefit" from the UIF. This benefit will be at a flat rate equal to the minimum wage (R3,500) per employee for the duration of the shutdown or a maximum period of three months, whichever period is the shortest.

### Reduced salary



Employees and employers may negotiate and agree on a reduced salary.

### UIF Special Leave

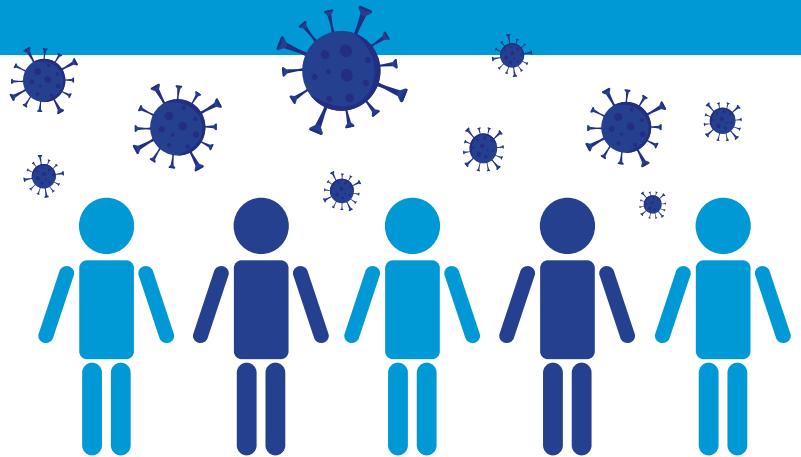


If employees must subject themselves to be self-quarantined for 14 days (or longer) such leave will be recognised as "special leave" and employees will be permitted to apply for UIF benefits which will be paid on condition that the reason for the quarantine meets the necessary requirements.

# Employment Survival Guide

Know your employment rights

The COVID – 19 (or “Coronavirus”) is spreading. Employers and employees have a role to play in limiting its impact. In this alert, we answer some of the most pressing questions that have been asked over the past few days.\*



## 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.



## 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.



## 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.



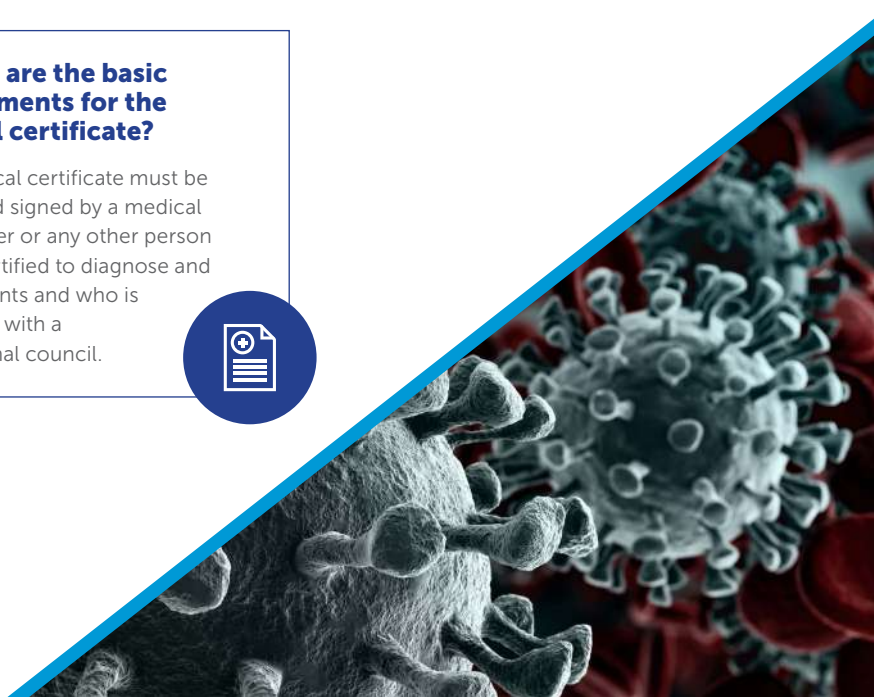
## 2. Must an employee be paid for sick leave?

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.



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

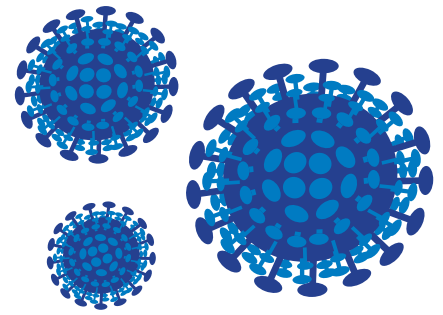
The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council.





# Employment Survival Guide

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## 6. What about “special leave”?

The Minister of Employment and Labour, Mr Thulas Nxesi, announced on 17 March 2020 that if employees must subject themselves to be self-quarantined for 14 days (or longer) such leave will be recognized as “special leave” and employees will be permitted to apply for UIF benefits which will be paid on condition that the reason for the quarantine meets the necessary requirements.\*



## 9. 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.



## 7. Will the Department of Labour assist employers in distress?

The Minister of Employment and Labour, Mr Thulas Nxesi, announced on 17 March 2020 that a period of reprieve will be considered in order for companies not to contribute to the Unemployment Insurance Fund (UIF). He said the Employee Relief Scheme will be used to avoid workers being laid off. Companies contemplating a short term shut down must notify the Department who will dispatch a team to visit these companies to provide assistance with the processing of UIF claims.\*\*



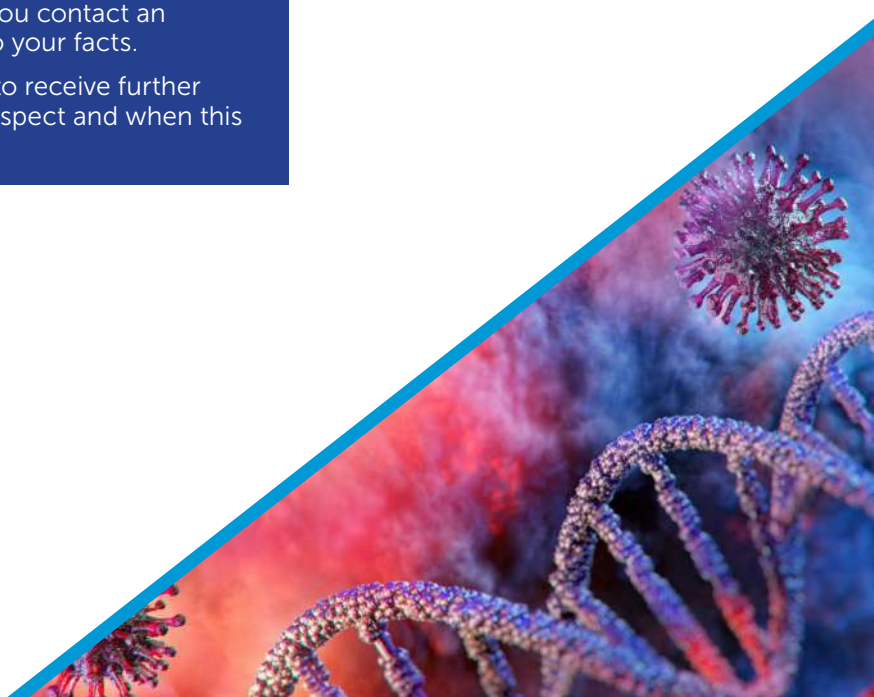
## 8. When can an employee be dismissed due to the Coronavirus?

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.



\*The answers to these questions are always subject to the specific facts of each matter and we recommend that you contact an employment law expert for advice applicable to your facts.

\*\* These issues are developing and we are still to receive further detail on government’s considerations in this respect and when this will become effective.





## 10. May an employer require an employee to use annual leave?



Yes, however this should not be done for periods of self-isolation or quarantine and only applies to the statutory portion of annual leave (i.e. 15 business days). This measure is also subject to the contents of the contract of employment, leave policy or any applicable collective agreement.

Statutory annual leave is regulated by the BCEA. Section 20 sets out the framework for statutory annual leave. An employer must grant statutory annual leave in accordance with an agreement between the parties. In the absence of an agreement the employer may determine the time for statutory annual leave to be taken. When an employer wishes to send employees home on statutory annual leave to keep them away from the office during a pandemic such as this, it may determine the time for them to take statutory annual leave. The employees are paid as they are on statutory annual leave.

## 11. May employees be required to work from home?



Yes. Working from home may be permitted. 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.

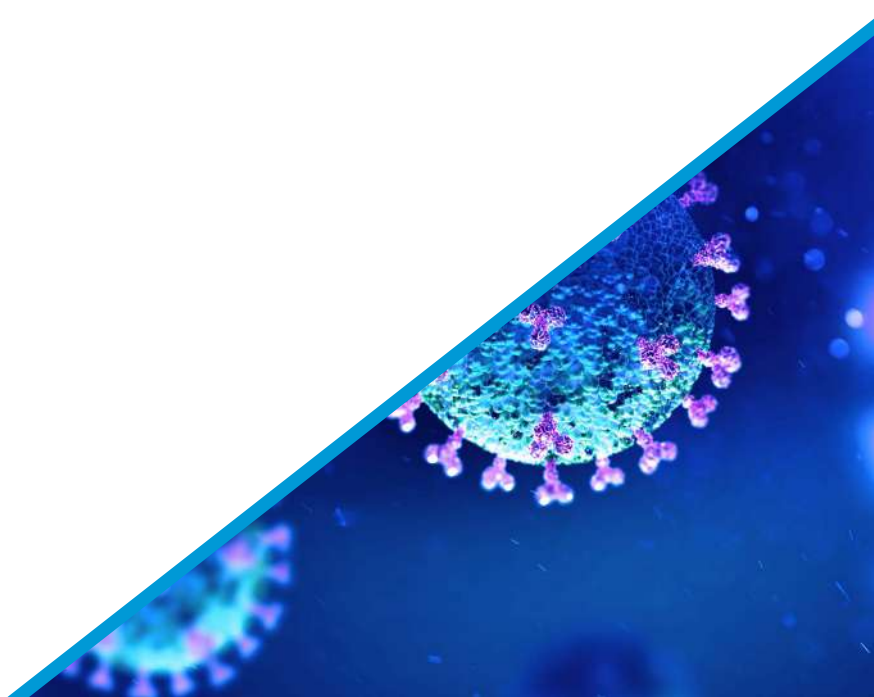
## 12. As an employer, what are my obligations whilst the workplace is open?

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.

On 17 March 2020, the Minister of Employment and Labour urged employers to conduct a health and safety risk assessment in consultation with its employees, whilst ensuring that measures are put in place to ensure a healthy workplace in terms of its health and safety obligations such as the provision of the necessary protective equipment and put in place systems to deal with the outbreak, as well as including all mitigating measures that are to be put in place until the outbreak has been dealt with.\*\*



# Employment Survival Guide

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## 13. As an employee, what are my obligations, if the workplace is open?



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 if the workplace is open



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.

## 15. As an employer, what are the options during the shutdown?

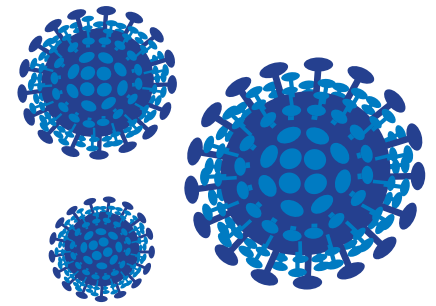


The options are set out in the option schedule, included with this survival guide. It includes, annual leave, reduced salaries, the temporary employee relief scheme or the disaster management fund.



# Employment Survival Guide

Know your employment rights



## How do we measure up? The impact of the economic recession and COVID-19 on the performance of the CCMA and UIF

On Wednesday 4 March 2020, the Parliamentary Portfolio Committee on Employment and Labour was briefed by the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Unemployment Insurance Fund (UIF) on their respective second quarterly performances 2019/20. The discussions raised the negative impact on performance of the economic recession and in turn budget constraints, as well as the challenges posed by COVID-19 (Coronavirus).

The pressure on UIF was noted following the 2017 amendments to the UIF Act, which was aimed at improving benefits to contributors. It was reported that the increase in benefits payments estimates resulted in a 146% overspend. It was further noted that the recession results in employment in the form of seasonal and contract work as opposed to permanent employment (particularly in the agricultural and construction sectors), which increases unemployment. This, in turn, increases UIF claims. The increasing claims reflect a worrying lack of skills amongst the youth. Important questions were raised by the Committee as to whether UIF was ready and had sufficient finances to deal with the anticipated spike in claims given the possible increase in the retrenchment of civil servants following the Budget Speech and in addition, as a result of the Coronavirus.

The Committee noted the Department's launch on 6 March 2020, of the National Minimum Wage Hotline. The Hotline enables employees to report cases of non-compliance with the national minimum wage without incurring any cost themselves. No data, airtime or smartphone is necessary to make a complaint. The Hotline is one of

the mechanisms put in place by the Department to enforce compliance and accountability of employers. This is in line with its commitment to offer protection to vulnerable, isolated employees and create accessible channels. The Hotline will drive enforcement by tracking troublesome sectors. Inspectors will be deployed to investigate complaints within 14 days of a complaint having been lodged. The Director of the CCMA noted that the CCMA is confronted by challenging questions relating to domestic work and the national minimum wage. It is anticipated that the national minimum wage and questions of affordability will result in an unfortunate increase in the retrenchment of domestic workers.

The concerning and significant strain on the CCMA's resources following budget cuts and amongst other factors, the increase in retrenchment related cases, was discussed. The budget cuts have prevented the much-needed appointment of additional full-time commissioners.

Despite the challenges which the CCMA faced and continues to face it performed well in various respects in quarter two.

Of approximately 22,500 employees who were on the brink of losing their jobs, the intervention of the CCMA resulted in about 9,500 jobs being saved. Improved resources could improve this figure. A further example of positive performance was the roughly 78% of strikes having been settled by the CCMA (36 out of 46 was intervened in and resolved by the CCMA). Whilst these examples are to be commended, the prospect of continued and improved performance is questionable. A concern was raised in the meeting that a worst-case scenario may see the increased pressure on the limited resources of the CCMA resulting in the CCMA having to turn away cases.

The Deputy Minister of Employment and Labour noted that South Africa is on the verge of despair as it faces the simultaneous challenges associated with the Coronavirus and the economic crisis. However, she encouraged citizens to meet the challenge saying that "the best economy is achieved by teamwork". It is hoped that this can indeed be achieved and that all South Africans can work together to avoid debilitating despair in these challenging times.





## C is for closing borders and COVID-19, but sometimes also concessions

Since the outbreak of the COVID-19 (Coronavirus) in late 2019, over 215 000 people have been diagnosed with the illness and over 10 000 confirmed people have died at the time of penning this article.

On 15 March 2020, President Cyril Ramaphosa, while giving a national address on national television, stated that there would be strict temporary measures to restrict the inflow of foreign nationals into the country as a result of the Coronavirus and its threat to the general populace. The Ministry of Home Affairs and the Department of International Relations and Cooperation have since then acted accordingly. Hence a temporary travel ban has been issued to be implemented from 18 March 2020, which bans all entry regardless of the visa status of all foreign travellers emanating from Italy, Iran, the Republic of Korea, Spain, France, the Swiss Federation, the USA and China. Any foreign national no matter place of origin who had visited any of the mentioned above high-risk countries in the past 20 days would be denied visa and presumably denied entry into South Africa whilst travellers from medium risk countries such as Portugal, Hong Kong and Singapore will have to undergo high intensity screening. Foreign nationals from medium risk countries which were exempt from visa requirements will now with immediate effect be required to apply for visas in order to visit South Africa in which a medical report will be required to indicate whether or not they have tested positive for COVID-19.

Any port of entry visas that were issued to citizens of China and Iran before or on 15 March 2020 for the purposes of visiting the Republic have been cancelled with immediate effect and declared null and void. Furthermore, South African citizens returning from any high risk countries will have to undergo testing and self-quarantine on their return to South Africa, self-quarantine means self-isolation for a period of 14 days. Through the

Travel Advisory issued the Minister of International and Cooperation warns that South African citizens planning to travel through the Italian Republic, the Islamic Republic of Iran, the Republic of Korea, the Kingdom of Spain, the Federal Republic of Germany, the United States of America, the United Kingdom, the French Republic, the Swiss Confederation and China as well as the European Union should refrain from doing so. Further, that they should also refrain from travelling on cruise ships with immediate effect until further notice. It must be noted that all international travellers including South African citizens, entering South Africa will be required to complete the prescribed health form to be handed to Health officials and Immigration officers. Including this they will be subjected to medical screening upon entering South Africa.

### Concessions

A few concessions have however been made. These concessions allow a departure from the welcomed but sever restrictions highlighted above. The above-mentioned restrictions do not include holders of diplomatic passports and travel documents issued by international organisations as well as their family members and holders of official/service passports. These restrictions will not apply to the crew members of aircraft and cargo ships, as well as cross border rail and road transportation workers. However, the excluded travellers will be subjected medical screening and be isolated or quarantined if required. If however any foreign nationals need to travel to South Africa for an emergency or any compelling reasons may contact the nearest South African Mission or

Consulate to apply for a visa. However, these visa applications will only be considered on merit and thus amounting to a case-by-case basis visa issuance.

Furthermore, in accordance with the Immigration Directive NO.7 of 2020, any foreign national present in South Africa who originates from a country affected with COVID-19 or who will through transit have to pass through a COVID-19 affected country is permitted to re-apply for a visa, in which such visas will be valid until 31 July 2020. Should it be the case that the visa had already expired since 1 December 2019 or is to expire by 31 March 2020 they will still be permitted to reapply for a visa without needing to first obtain a Form 20. A Form 20 is a requirement needed by an illegal foreigner where their visas have expired. A Form 20 will allow them to remain in the country pending the application status of their visa re-application. However these concessions are only afforded to foreign nationals who had been legally admitted into South Africa. Where a foreign national does not meet one or more of the prescribed requirements for a temporary residence visa, he/she may apply to the Minister in the prescribed manner to waive such a requirement(s). However, no application for change of status or conditions will be allowed. In other words, the foreign national will only be allowed to apply for a new temporary residence visa on the same visa conditions.





## Employees – Go Home! “No Work No Pay”? The Unintended Consequences of COVID-19

“COVID-19 - helping people realise that some meetings can be emails.” These are the words which have appeared in one of the popular memes being circulated in response to the spread of the COVID-19 (Coronavirus). Although in jest, they reflect the truth that COVID-19 has served as a disruptor in the labour context by presenting employers with entirely novel legal challenges and forcing them to adapt their labour practices to remain commercially viable. Our labour legislation has developed to cater for labour disputes and industrial action in a world free from pandemics. However, COVID-19 has created entirely new and unforeseen legal issues which our labour statutes are arguably ill-equipped to address. The consequences of the spread of COVID-19 cannot be ignored and the onus falls on employers and legal practitioners alike to consider what legal issues will arise and how our labour law can adapt to address these.

The President in his address on 15 March 2020, noted the significant and lasting impact that COVID-19 will have on our economy – referring to the dramatic decline in economic activity in our major trading partners, a sudden drop in international tourism and severe instability across all global markets as proof thereof. President Ramaphosa provided that the anticipated effects of the decline in exports and tourist arrivals will be exacerbated by both an increase in infections and the measures we are required to take to contain the spread of the disease. President Ramaphosa further noted the severe impact COVID-19 will have on production, the viability of businesses, job retention and job creation. In light of these impending and devastating consequences, the President announced that Cabinet was in the process of finalizing a comprehensive package of interventions to mitigate the expected impact of COVID-19 on our economy. This package, which will consist of various fiscal and other measures, will be concluded following consultation with business, labour and other relevant institutions.

Employers’ responses have been diverse and dependent on their particular context. Some employers have sent

employees to work from home as a precautionary measure. Some employers have adopted a rotation system whereby employees take turns to attend work according to a shift schedule. Some employers have further been forced to send their employees home as a result of operational and supply chain disruptions caused by COVID-19. All of these responses have short term and long-term legal consequences.

The legal questions which have arisen in response to the President’s address and the current state of affairs include: what are employer’s obligations under the Occupational Health and Safety (OHS) Act and how must they comply with them in the circumstances? What qualifies as a gathering and what effect does the prohibition have on the workplace? What are the consequences of the prohibition of gatherings of more than 100 people on protests and pickets? Does COVID-19 and qualify as a *force majeure* and what are the consequences of this on employer’s contractual obligations? Following from this, will employers be required to continue paying their employees even where doing so would jeopardize the commercial viability of their business? What impact will COVID-19 have in catalysing the fourth industrial revolution?

Due to the novelty of these legal issues, the considerations which employers are to make in addressing them are similarly novel and countless. The issue which has bedevilled many-a-citizen is the extent of employers’ remuneration obligations in circumstances where a pandemic has caused employees to be sent home for reasons beyond the employers control and employers aren’t able to utilize their productive capacities.

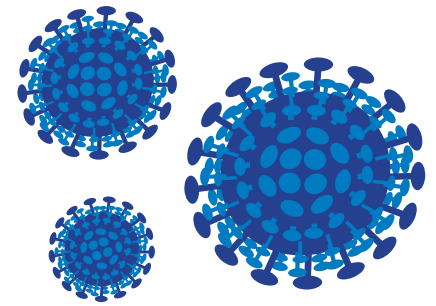
The question becomes how does the law expect employers to balance their remuneration obligations to employees with their obligations to maintain a commercially viable business?

Employers are to consider the following obligations, arising from contract and statute, in responding to this scenario:

- **Short-time or Temporary Layoffs:**

Employers may want to consider short-time or temporary layoffs as a means of balancing their obligations to their employees with the need to maintain a commercially viable business.





## Employees – Go Home! “No Work No Pay”? The Unintended Consequences of COVID-19

Short-time entails the reduction of the working hours of an employee, with a corresponding decrease in the employee's remuneration.

Temporary layoffs entail the temporary suspension of employees' employment where the employer is unable to afford its employees due to a lack of revenue coming into the business.

- **An Act of God and Contractual Obligations:**

The employer should also consider what the impact of the common law doctrine and principles relating to an act of God and supervening impossibility of performance may have on their contractual performance obligations.

There are circumstances where employer's contractual remuneration obligations may arguably be temporarily suspended as a result of performance thereof becoming impossible due to an act of God or an unexpected and unforeseeable occurrence.

There is little South African case law applying these principles in the employment context. However, in cases dealing with an outbreak of foot and mouth disease in Botswana, the court held that employers were discharged from their remuneration obligations where the employment contracts were rendered impossible to perform as a result.

- **Directors Fiduciary Duties:**

Company employers must consider their duty to act in the best interests of the company when sending employees home with a promise

of payment where there is a risk of jeopardizing the continued operation of the company and rendering it insolvent. Accordingly directors should be cautious in complying with their fiduciary duties.

- **Retrenchment/4<sup>th</sup> Industrial Revolution:**

Employers are having to adapt to the operational disruptions created by COVID-19 by increasingly using technology. The unexpected consequence of this may be that the fourth industrial revolution is catalysed as employers realize that their businesses can operate with technology instead of employees. In view of this unintended consequence, employers may want to effect retrenchments for operational reasons. The consequences of the fourth industrial revolution may unintentionally be brought forward.

- **Period of Reprieve and Paid Quarantine Period:**

The Minister of Employment and Labour, Minister Thulas Nxesi, provided that in order to assist distressed companies a period of reprieve will be considered whereby employers will not be required to contribute to the Unemployment Insurance Fund (UIF). The Minister further provided that the Fund's temporary Employer/Employee Relief Scheme will be used to ensure that workers are not laid off. Accordingly, where employers decide to temporarily close as a precautionary measure, the short term UIF benefit will be triggered upon the company informing the Fund of their intention to close.

The Minister further provided that where an employee is required to be quarantined for 14 days, such a leave will be recognized as a special leave which will be fully paid on condition that the reason for the quarantine meets the requirements. Where an employee is required to be quarantined for a period of longer than 14 days, due to having travelled or having been in contact with an infected person, then such leave will be recognized as special leave and that employee will be eligible to apply for unemployment insurance benefits. Notably these benefits will not come from employers pockets.

- **Regulations issued in terms of the Disaster Management Act:**

The Department of Cooperative Governance and Traditional Affairs issued Regulations in terms of the Disaster Management Act setting out steps necessary to prevent the escalation of COVID-19. In terms of these Regulations, the Department of Defense and organs of State must make resources available to ensure the delivery of essential and emergency services. Employers who qualify as an essential and emergency services should bear the provision of these resources in mind.





## Employees – Go Home! “No Work No Pay”? The Unintended Consequences of COVID-19

Notably, the Regulations further provide for penalties for non-compliance with its provisions, including a fine or imprisonment.

- **Definition of Gatherings in terms of the Regulations:**

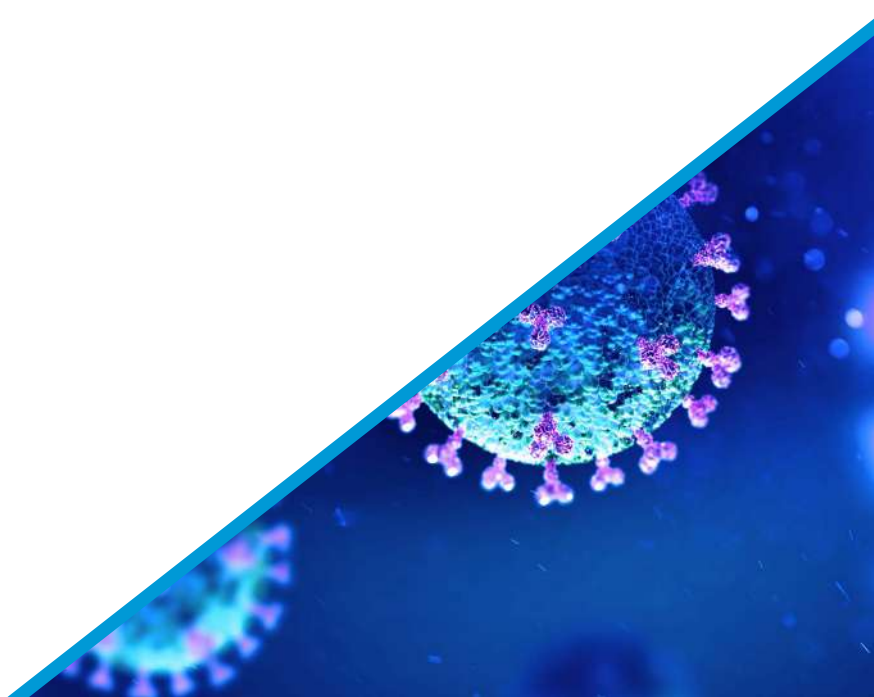
The definition and regulation of gatherings in the abovementioned Regulations bears further consideration. The Regulations define a gathering as any assembly, concourse or procession of more than 100 persons, wholly or partially in open air or in a building or premises. The Regulations provide that where a gathering takes place, enforcement officers must order the

people to disperse. If they refuse to disperse the enforcement officer must take appropriate action, which may include arrest and detention.

**Conclusion:**

Employers must also bear in mind that even after the virus has been addressed effectively, there will be legal consequences resulting from the effects thereof on the workplace for many years to come. Where dismissals and retrenchments eventuate as a result of the operational disruptions caused by the virus, courts will want to see what employers did at the time of the spread of the virus to mitigate against the risk of

retrenchments. The disruption caused by COVID-19 must also be seen as a catalyst for employers to adapt their operations so as to successfully move into the 4th industrial revolution. This entails that employees' ability to work be decentralized from the physical workplace into employees homes where possible. Ultimately, in view of the unforeseen threats posed by COVID-19 to business, employer's would be wise to tread carefully and undertake a thorough consideration of the above factors in determining their obligation to pay employees so as to avoid the negative long-term legal consequences which may visit upon them should they not.





## Coronavirus and the workplace: What to do?

On 5 March 2020, South African Minister of Health, Dr Zweli Mkhize, confirmed the first incident of COVID-19, commonly known as the corona virus in South Africa. This is likely to create a panic in workplaces across the country because of the way in which the virus spreads. What do we know so far?

Corona virus spreads through:

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

The advent of the virus will most likely result in employees wanting to work remotely and take extended leave because of the virus. The Basic Conditions of Employment Act 75 of 1997 has a closed list of recognised forms of leave – sick leave, family responsibility leave, adoption leave, annual leave and paternity leave – with the exception of annual leave, none of these forms of leave accommodate employees who do not wish to report for fear of contracting a virus. Sick leave should only apply to employees who are showing symptoms of the virus (i.e. actually sick) as opposed to those who fear contracting the virus.

If the virus escalates, employers across the country may be required to consider flexible working arrangements such as – allowing employees to work remotely instead of reporting to the office, and even limiting traveling for employees. The option of remote working will be subject to operational requirements of that particular employer.

Also, the option of remote working is only open to a small percentage of South African employees – retailing, banking and fast-moving company goods companies cannot afford to extend the same arrangement. In those instances, the employers should consider the following questions:

Employers must be proactive and take charge and encourage calm. These are some ideas:

1. Does the threat of infection have the potential of impacting or affecting organisational culture?
  - Human touch is part of everyday work life, therefore, organisational culture such as human interactions, and handshakes amongst other things will likely decrease.
  - Therefore, launching a hygiene campaign, including instructional guides on how to wash hands effectively and keeping an employee's workspace clean and hygienic is an option.

2. Can employees wear a face mask to work?

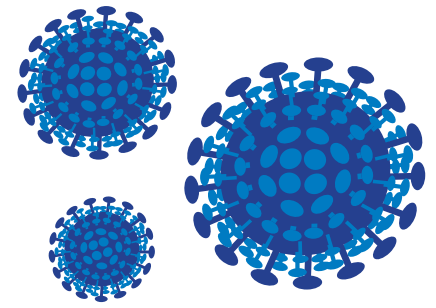
- Unlike industries such as mining and firefighting where protective clothing is a requirement, employers are not legally obliged to provide masks.
- Therefore, wearing face masks to work would be at the employer's discretion and informed by its risk to exposure to the virus.

In conclusion, employers need to be proactive in their efforts to mitigate the spread of the virus. Subtle changes in workplace culture such as declaring the workplace a handshake free environment and creating awareness for visitors, clients and other external stakeholders to manage expectations are an option. For those employees experiencing symptoms of the virus, the employer may encourage those employees to wear masks as a precautionary measure. This is dependent on the prevalence of the virus across the country.

At the time of publishing this article, there was only one reported incident in the country.







## IMMIGRATION

### Coronavirus – temporary concession for Chinese Nationals currently in South Africa

Since the outbreak of the COVID-19 virus in late 2019 (coronavirus), nearly 80,000 people have been diagnosed with the illness and more than 2,600 people have died at the time of penning this article – it's no wonder the world is sitting up to take note of these developments.

The world's authorities have learned that swift action is needed in order to prevent the widespread distribution of the illness across international borders.

Some countries and airlines have embargoed flights to and from China and have even gone so far as to deny Chinese Nationals who from the Wuhan district (situated in Hubei), entry into state territory.

South Africa has also taken precautionary measures and introduced a temporary visa concession for Chinese nationals currently holding visitor's visas and temporary residence visas, in light of the corona virus outbreak.

It has been communicated that until further notice, Chinese Nationals whose visitor's visas have already reached the maximum validity period, will be

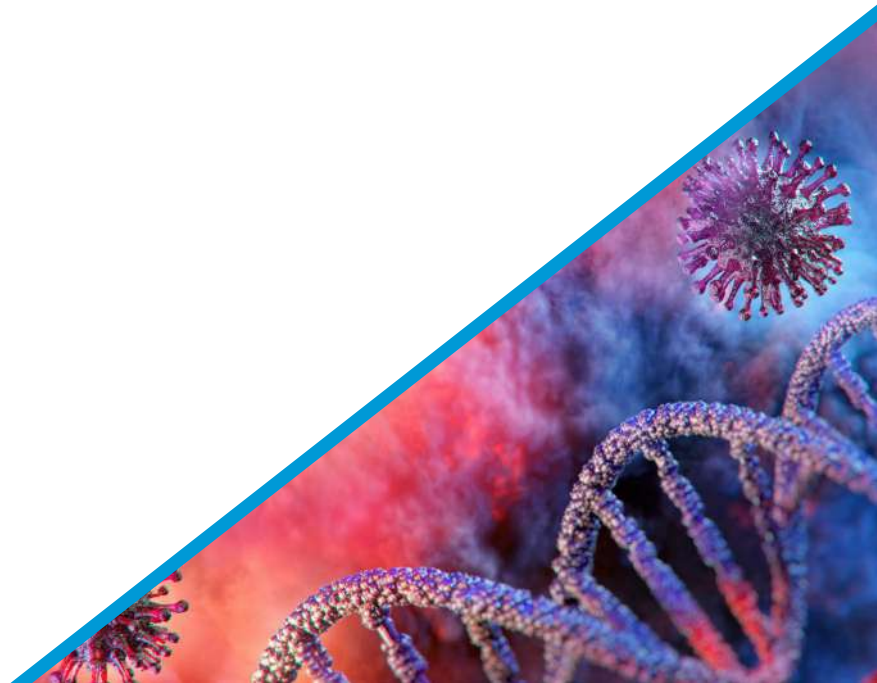
allowed to apply for a new visitor's visa on the same visa conditions for a further three-month period.

Chinese Nationals who hold intra-company transfer visas, which visas are due to expire on or before 31 July 2020, will be permitted to apply for three-month visitor's visas (with authorisation to work) in terms of section 11(2) of the Immigration Act.

Chinese Nationals who are holders of temporary residence visas which have already expired since 1 December 2019, and those which will be expiring by 29 February 2020, will be allowed to submit renewal applications for those expired visas without the need to first legalise their status in South Africa (form 20-authorisation for an illegal foreigner to remain in the Country pending an application for status).

These temporary concessions are only valid until 31 July 2020 and is only available to Chinese Nationals who were legally admitted into South Africa.

Unfortunately, these concessions do not seem to provide any relief to non-Chinese citizens, but who are ordinarily resident in China. Non-Chinese citizens who are required to return to China, may need to apply for special authorisation to benefit from these concessions.





## The Coronavirus and the workplace: #coughcoughsneeze?

In light of the Coronavirus (COVID-19) pandemic, it has become increasingly important for employers to develop strategies and procedures and to reconsider their workplace policies so as to better protect both employees and clients. The varying sources and confusing statistics have made it more incumbent on employers to adopt a radical approach to dealing with the virus.

Managing the risks associated with contracting the virus has not only affected the way employees engage with each other, but has also affected the ways in which employees engage with their clients, especially in a corporate setting. The Occupational Health and Safety Act 85 of 1993 places several obligations on both employers and employees to ensure a safe and healthy working environment.

### 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.

### Preparing the workplace for COVID-19

Firstly, follow the advice from authorities in your community.

1. How Covid-19 spreads – COVID-19 spreads in a similar way to the flu. One can catch COVID-19 by the following:
  - 1.1. Touching contaminated surfaces or objects, and then touch your eyes, nose or mouth;
  - 1.2. By standing within one meter of an infected person – you stand a chance of breathing in droplets coughed out or exhaled by them.
2. Ways of preventing the spread of Covid-19 in the office environment:
  - 2.1. Wipe down surfaces (desks; counters) and objects (telephones; keyboards; stationary) regularly with disinfectant regularly;

2.2. Encourage regular and thorough hand-washing by all employees, clients and contractors:

- 2.2.1. Put sanitising hand rub dispensers in prominent places in the office. Examples of such places include elevator buttons, bathrooms, frequently used doors, printing rooms, and kitchens;
- 2.2.2. Display posters promoting hand-washing in all bathrooms and frequently used pathways;
- 2.2.3. Use routine meetings and communications to reinforce the importance of regular hand-washing;
- 2.3. Promote good 'respiratory hygiene' in the workplace:
  - 2.3.1. Encourage employees and clients to sneeze into their bent elbows;
  - 2.3.2. Make tissues readily available. Encourage employees to cough/sneeze into these. Make sure that this is accompanied by closed bins for safe disposal.



# Employment Survival Guide

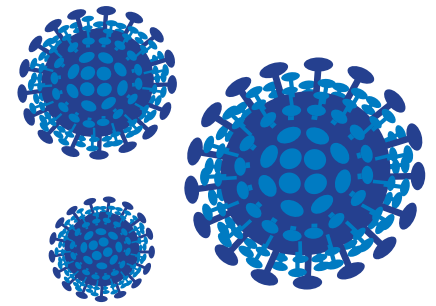
Know your employment rights



## The Coronavirus and the workplace: #coughcoughsneeze?

- 2.4. Brief your employees on the symptoms of COVID-19 and what they should look out for. Advise that they seek medical attention should they develop symptoms.
- 2.5. Considerations when organising meetings and events:
  - 2.5.1. Before the meeting:
    - 2.5.1.1. Consider whether a face-to-face meeting is necessary, or whether it can be replaced by a teleconference or internet-based meeting;
    - 2.5.1.2. Could the meeting be scaled down? Is everyone invited absolutely essential?
    - 2.5.1.3. Pre-order supplies such as tissues and hand-sanitizer for all participants.
  - 2.5.1.4. It is advisable to ensure that all parties (participants, caterers etc) provide contact details. Communicate clearly that their details will be shared with local authorities should any parties show symptom and the need thereof arise.
  - 2.5.1.5. Ensure that all parties to the meeting are aware of the 'no handshake' policy. It may be useful to inform parties of this policy prior to the meeting.
  - 2.5.2. During the meeting:
    - 2.5.2.1. Try and seat each participant at least 1 metre away from one another;
    - 2.5.2.2. Provide tissues and a closed-bin should any participants need to cough or sneeze;
    - 2.5.2.3. If possible, open windows and doors.
  - 2.5.3. After the meeting:
    - 2.5.3.1. Should the need arise, keep the names and contact details of all participants for at least one month. This is in the event that public health officials need to contact participants if one participant develops symptoms.





## Important developments impacting occupational health and safety in the wake of COVID-19

On 15 March 2020, the COVID-19 pandemic was declared a national disaster given its magnitude and severity. The impact is being felt in South Africa, but swift measures are being taken to co-ordinate and manage this health hazard.

In this past week, the National Disaster Act Regulations were published and relief provided for small and distressed employers in terms of the UIF Fund, for example, a reprieve where such employers could apply to be exempted from making contributions to the Fund. It also provides benefits for employees who are required to self-isolate for a 14-day period.

On 20 March 2020, two further important steps were taken by the Minister of Employment and Labour, namely:

1. an appeal to employers to take guidance from the Hazardous Biological Agents Regulations in terms of the Occupational Health and Safety Act, 85 of 1993 (the OHS Act); and
2. a Notice issued by the Compensation Commissioner in terms of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993, as amended (COIDA), making COVID-19 a compensable occupational disease if contracted by an employee arising out of and in the course of his or her employment (occupationally acquired COVID-19)

### The Hazardous Biological Agents Regulations

#### To whom does it apply?

It normally applies to those employers whose business it is to produce, process, use, handle, store or transport a hazardous biological agent ("HBA") in the normal course of business. It is an incidental measure where an event occurs that does not involve a deliberate intention to work with an HBA, but where the potential to result in inadvertent exposure occurs.

These Regulations, in the same way as the OHS Act, do not apply to the mining industry as those employers are covered by different legislation. The Minister of Mineral Resources and Energy can declare that any provision of the OHS Act or regulation will apply, but this would be unprecedented.

What type of workplaces fall under the Regulations?

Workplaces where an HBA would normally be encountered are:

- in-food production plants
- sewerage purification plants
- where there is contact with products of an animal origin
- diagnostic laboratories etc.

In relation to other types of workplaces, these Regulations have incidental application.

#### What is an HBA?

It includes different types of viruses, bacteria and parasites. The "coronaviridae" is included under the category of viruses.

What are some of the relevant components of the Regulations of use to employers combatting the spread of COVID-19?

The nature of many businesses is such that work cannot be performed remotely. In these instances, the focus is on reducing the role of the virus spreading.

These Regulations are useful, for example, the requirement to share information and provide training in consultation with health and safety committees, raising awareness of the risks of an HBA, adherence to workplace instructions, provision

of appropriate personal protective equipment (PPE), adherence to guidelines governing best practice around hygiene and health.

The mechanism of the risk assessment is critical to identify areas of work that pose a risk of contamination and to determine how those risks might be eliminated, controlled or reduced.

Notice on Compensation for Occupationally-Acquired Coronavirus Disease (COVID-19) under COIDA (the Notice)

The Notice extends compensation under COIDA to occupationally acquired COVID-19 if it is contracted by an employee arising out of and in the course and scope of his/her employment.

What test is applied to establish an occupationally-acquired COVID-19 diagnosis?

The following factors have relevance:

- occupational exposure to a known source of COVID 19;
- a reliable diagnosis of COVID-19 per the World Health Organization guidelines;
- an approved official trip and travel history to countries and/ or areas of high risk for COVID-19 on work assignments;







## Important developments impacting occupational health and safety in the wake of COVID-19

- a presumed high-risk work environment where transmission of COVID-19 is inherently prevalent; and
- a chronological sequence between the work exposure and the onset of the symptoms.

The Notice is aimed primarily at employees who are engaged in very high risk or high risk occupations. The categories set out in the Notice are as follows:

- Very high risk occupations include healthcare workers including doctors, nurses and hospital staff, healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients and morgue workers involved in performing autopsies etc.

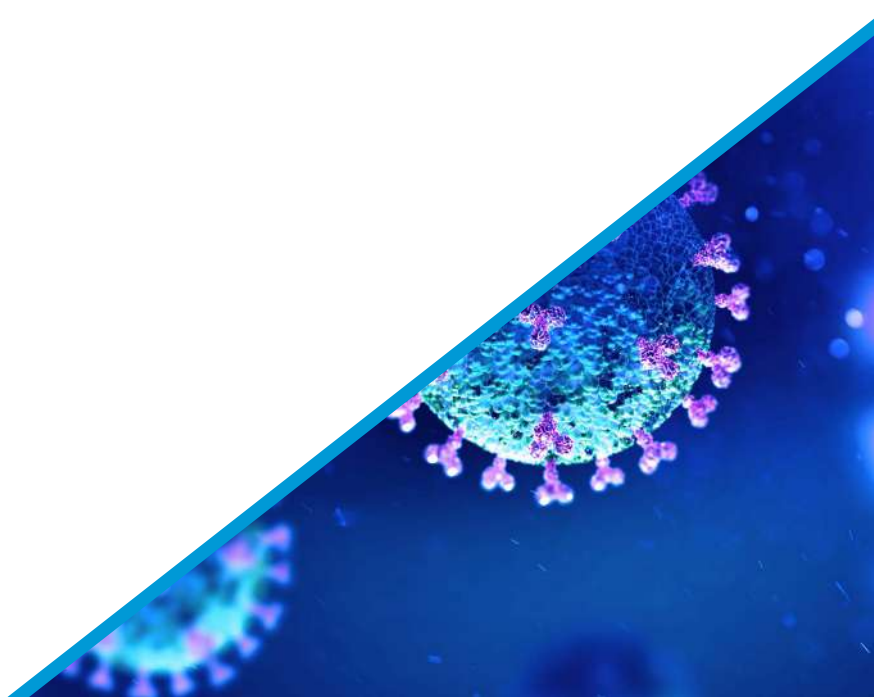
- High exposure risk occupations include healthcare delivery and support staff, medical transport workers and mortuary workers.
- Medium risk occupations involve those persons who require frequent close contact (within two meters) of other persons who may be infected with COVID-19.
- Low risk occupations involve persons who do not require contact with other persons known to be or suspected to be infected by COVID-19.

However, the emphasis remains on whether or not the employee suffered an occupationally-acquired case of COVID-19.

The overall test for benefits is whether there is a confirmed diagnosis of temporary total disablement, for a period not exceeding 30 days, or permanent disablement.

### What does the employer have to pay?

- The employer is obliged to pay the first three months compensation and thereafter seek a recoupment from the Compensation Fund or recognised mutual association. There are limits that apply.
- Sick leave entitlements under the BCEA would still apply.
- UIF sick benefits remain a separate entitlement.



# Employment Survival Guide

Know your employment rights



## COVID-19 and pregnancy in the workplace

A pregnant woman is for all intents and purposes, the agent and carer of her unborn child. The pertinent question is to what extent employers should take this into consideration when providing a safe and secure work environment for its employees? In light of the COVID-19 pandemic, should employers be doing more to protect and safeguard pregnant employees (and the unborn children) at this time?

In terms of the common law, an employer has a duty to provide a safe working environment for its employees. This is further qualified by the legal obligation of an employer to maintain a working environment that is safe and healthy, as determined by the Occupational Health and Safety Act 85 of 1995 (OHS Act). Similarly, the Basic Conditions of Employment Act, 75 of 1997 (BCEA) expressly provides for the protection of employees before and after the birth of a child, in that no employer may require or permit a pregnant employee (or an employee who is nursing her child) to perform work that is hazardous to her health or the health of her child.

Given the above legal obligations imposed on employers, while the effects of COVID-19 on pregnant women and their unborn children remain largely unknown at this stage, employers should be encouraged to “go the extra mile” when considering the health and safety of pregnant employees

during the COVID-19 pandemic. Some practical considerations to be adopted by employers aiming to accommodate pregnant employees in the workplace are as follows:

1. Allowing pregnant employees to work from home if this is possible in terms of the employer’s operational requirements;
2. Affording pregnant employees additional leave benefit on a *quid pro quo* basis. This would mean that the employee would agree to take a form of additional paid leave, and work it back at a later stage;
3. If the employer’s operational requirements require a pregnant employee to attend the premises of the employer, employers could consider providing a safe and isolated space within the office premises in which the pregnant employee can fulfil her duties whilst ensuring her health and safety.

Given the potential vulnerability of pregnant employees and the duty of the employer to provide a safe working space for all employees, employers should consider further means of giving effect to their legal obligations towards pregnant employees, especially in the context of the COVID-19 pandemic.

Lastly, given the recent amendments to the BCEA regarding parental leave, the same additional considerations should be applied in respect of same sex and adoptive parents, to the extent applicable.

### DISCLAIMER:

The Employment Survival Guide is an informative guide covering a number of topics, which is being published purely for information purposes and is not intended to provide our readers with legal advice. Our specialist legal guidance should always be sought in relation to any situation. This version of the survival guide reflects our experts’ views as of 25 March 2020. It is important to note that this is a developing issue and that our team of specialists will endeavour to provide updated information as and when it becomes effective. Please contact our employment team should you require legal advice amidst the COVID-19 pandemic



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