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EMPLOYMENT

Accommodating employees in the workplace

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Under the current COVID-19 regulations, employers must ensure that a number of measures are put in place in the workplace in order to ensure the health and safety of employees. Some measures may, however, present a challenge when it comes to accommodating all of the employees in the workplace at any given time.

Employer's health and safety obligations

On 29 April 2020 the Minister of Cooperative Governance and Traditional Affairs published Regulations in terms of the National Disaster Management Act ("**Regulations**"). The Regulations require an employer to adopt measures to ensure health and safety of persons in the workplace. These measures include physical distancing measures. Physical distancing measures include:

- enabling employees to work from home or minimising the need for employees to be physically present at the workplace;
- the provision for adequate space in the workplace;
- restrictions on face to face meetings;
- special measures for employees with known or disclosed health issues or comorbidities, or with any condition which may place such employees at a higher risk of complications or death if they are infected with COVID-19; and
- special measures for employees above the age of 60.[1]

In addition, the provisions of the Regulations dealing with Lockdown Level 3 expressly state, in relation to the 'operation of the economic and public sector' that "relevant health and safety protocols and social distancing measures set out in Directions must be adhered to, in addition to the occupational health and safety directions issued by the Cabinet member responsible for employment and labour, and applicable labour legislation."[2]

The provisions regarding lockdown level 3 also provide that "employers must implement measures for employees who are over the age of 60 or those with co-morbidities to facilitate their safe return to work, which may include special measures at the work place to limit these employees' exposure to Covid-19 infection and where possible the employees work from home." [3]

Specific measures are also put in place for employers with more than 100 employees and construction, manufacturing, business and financial service firms with more than 500 employees.

The Regulations must then be considered in conjunction with the Occupational Health and Safety Directive published by way of Government Gazette on 29 April 2020 ("**Directive**"). The Directive provides for a number of measures aimed at regulating health and safety in the workplace (for both workers and members of the public). The obligations imposed by the Directive are over and above that of the Occupational Health and Safety Act, which remains applicable.

The Directive requires employers to, among others, minimize the number of employees at the work place in order to adhere to social distancing. For instance, the Directive provides that employers "must, as far as practicable, minimise the numbers of

workers on at the workplace, at any given time through rotation, staggered working hours, shift systems remote working arrangements or similar measures in order to achieve social distancing."[4]

The Directive also requires the employer to arrange the workplace in a way as to ensure minimal contact between workers and, as far as practicable and ensure at least one and a half metres between workers while they are working.[5] If the workstations cannot be spaced to allow for the minimum distance apart, the employer must arrange physical barriers to be placed between workstations or erected on workstations to form a physical barrier between workers while working or supply employees with the appropriate Personal Protective Equipment, free of charge, based on a risk assessment of the workplace.[6] Where the workplace is open to members of the public then a number of obligations are placed on the employer to ensure social distancing measures are adhered to.[7]

Issues with accommodating all the employees

The employer is required to ensure a healthy and safe working environment and the Directive emphasises the employer's duties in this regard. What must an employer do, however, if it is unable to ensure social distancing between the workers or implement the measures referred to above?

The health and safety obligations imposed on the employer are obligations imposed by law. The employer must, therefore, adhere to them. If an employer cannot accommodate all, or some, its employees in the workplace at any given time due to social distancing requirements or is unable to satisfactorily implement the required measures to ensure employees safety (for instance, where the employees have comorbidities and / or are over 60), there is a legal impossibility of allowing staff back to work. In such circumstances, the employer is not required to pay the employees their salaries on the principle of 'no work no pay'.

Reduced work time

As discussed above, the Directive allows for social distancing to be achieved through rotation, staggered working hours, shift systems, remote working arrangements or any similar measures. Where an employer can only accommodate a portion of its workforce at any given time then options such as shift systems or staff rotation are measures which can be considered.

Where this results in employees working less hours than they would ordinarily (and therefore earning less than normal) they may qualify for a reduced work time benefit in terms of the Unemployment Insurance Fund ("**UIF**"). The Unemployment Insurance Act[8] states that the benefit is payable to contributors who will receive an income that would be less than the benefit received if he or she had become wholly unemployed, subject to the contributor having enough credits.[9] The Department of Employment and Labour have urged employers to apply for relief available to employees.[10]

Selecting which employees can return to work

If an employer, who cannot fully accommodate its employees in the workplace, adopts a shift system / rotates staff the question is whether all employees must be rotated or does the employer have an election as to whom it retains to render the services. An employer can select which employees to bring back provided it is on a justified basis and does not amount to unfair discrimination. The employer does not need the employees' agreement to do so. To begin with an employer would be advised to make an assessment as to: –

- the Employees who are needed start up and run the business;
- Key employees who need to be on site all the time; and
- Employees who can be rotated.

However, if there is a group of equally skilled employees, performing the same job and the employer needs to reduce the numbers, it is likely that an agreement would need to be reached in such a case.

Employers should try, as far as practicable and in accordance with the health and safety requirements, to accommodate all employees and this can be done by implementing some of the measures mentioned in the Regulations and the Directive. To the extent that an employer elects not to rotate staff then the basis for doing so must be rational and fair. Employees who earn less due to reduced work hours should be encouraged to seek assistance through the UIF.

Conclusion

It is clear that the Regulations do not ban the return to work of employees, even those who are in the high risk group. The Regulations do however require that certain steps be taken before employees return to the workplace. If those steps are taken then there should be no hurdle to the employees returning to work.

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[1] Regulation 5(5).

[2] Regulation 46(4).

[3] Regulation 46(5).

[4] Clause 16.7.

[5] Clause 17.

[6] Clause 18.

[7] Clauses 36 – 37.

[8] No. 63 of 2001.

[9] S 12(1B).

[10] http://www.labour.gov.za/improved-uif-systems-see-more-than-r5-billion-paid-out-in-benefits-to-workers.



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