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EMPLOYMENT

Are employers obliged to pay employees salaries/wages during the national lock-down?

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There is no doubt that the national lock-down announced by President Cyril Ramaphosa on 23 March 2020 has caused serious consternation to both employers and employees and chief amongst these are the financial difficulties caused for both employees and employers in various sectors. The Covid-19 pandemic has caused many employees to question whether or not they will be paid during the national lock-down period. Similarly, employers are placed in a legal conundrum as to whether an obligation exists in law for them to pay salaries/wages in circumstances where employees have not rendered any services during the course of the lock-down period. So, what is the legal position?

The basis of an employment relationship is the employment contract entered into between the employee and the employer in terms of which the employee would render services to the employer and the employer would remunerate the employee for the services rendered. In terms of the Basic Conditions of Employment Act (75 of 1997, as amended) "*wage*" is defined as "*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*." Thus an employer is under no legal obligation to pay salaries/wages to employees because no "*hours of work*" would have taken place during the lock-down period which entitles employees to earn wages/salaries. In a lock-down, it is clear that many employees are not in a position to render the contractual services or at all. Thus, in this situation, although not obliged to do so, in terms of the directive issued on 26 March 2020 and amended on 08 April 2020 ("the directive"), employers are encouraged to pay their employee's a salary/wage during the period of the lock-down despite the fact that the employees have not been able to render the services.

Employers who are willing to comply with the directive (to pay salaries/wages during lock-down) are however not without assistance as the Department of Employment and Labour ("the Department") has set up the Temporary Employer/Employee Relief Scheme ("TERS") to assist employers with the payment of employees' salaries/wages. TERS has been set up by the Department to assist employers who may close their entire business operations or part thereof for a period of three 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 lock-down period.

Therefore, TERS benefits may be claimed where an employer has implemented temporary lay-offs as defined in the directive. 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.*" In terms of clause 3.1 of the amended directive, employers may apply for relief in circumstances where the employer closes its operations, or part of its operations for a period of three (3) months or less. Since TERS is administered through the 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 should be noted that employees that are being paid during the lock-down period are not entitled to this benefit.

It may be important to distinguish claiming in terms of the UIF and TERS. Employees may claim UIF benefits in circumstances where the employer has closed its business operations permanently resulting in the employees been unemployed whereas TERS may be claimed where an employer has implemented temporary lay-offs as defined in the directives.

What does it mean for the underlying employment relationship between the parties?

Under the directive, the employment relationship subsists, but, the parties are unable to fulfill their contractual obligations due to lock-down. The principle is known as "*supervening impossibility*" which simply means that the employer is unable to perform his contractual obligations (payment of the employee's salary/wages) due to factors beyond its control and on the other hand the employee is also unable to perform his obligations (rendering of his services) in terms of the employment contract due to factors beyond his/her control. The supervening impossibility in this case is the Covid-19 lock-down. In terms of this principle the employer is discharged from its contractual obligations and therefore, it is not obliged to pay the employee and on the other hand, the employee is also discharged from his/her contractual obligations and he/she is therefore not obliged to render his/her services. The normal consequence of supervening impossibility in common law is the termination of the contract.

However, the directive has, in this instance, protected the employment contract between the parties in that, the parties' obligations are not discharged as it would be the case in common law, but, are merely suspended for the period of the supervening impossibility of performance. However, the directive does not oblige the employers to pay the salaries of the employees who are unable to render their services. The employers are encouraged, to the extent that it is possible, to continue payment of the salaries/wages. Therefore, an employer who wishes to comply with the directive and to pay employees' salaries during the lock-down period despite the fact that no services have been rendered, has the following options:

1. The employer may choose to pay the employees their normal salaries despite the fact that they have not rendered any services.
2. The employer may instruct the employees to take their annual leave including accumulated annual leave for the period of lock-down. Section 20(10)(b) of the BCEA provides that "*Annual leave must be taken (a) in accordance with an agreement between the employer and employee; or (b) if there is no agreement in terms of paragraph (a) at a time determined by the employer in accordance with this section*." Accordingly, nothing prohibits an employer from placing an employee on paid annual leave during the lock-down period.
3. The employer may pay part of the employee's salary and claim the remainder from TERS even though the TERS benefit is capped at R17 712.00 per month.
4. The employer who is unable to pay its employees any salary/wage during the lock-down period is also allowed to claim from TERS and the normal TERS thresholds will still be applicable.

It is important to note that the BCEA still applies as the directive provides that "*all employees in South Africa as a condition of their employment are entitled to leave provisions as set out in the BCEA. The BCEA recognizes certain forms of leave, which may, depending on the circumstances, be applicable to the employee's absence as a result of Covid-19*."



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