

EMPLOYMENT

Occupational Health and Safety Directive

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On 4 June 2020 the Minister of Employment and Labour, Thembelani Waltermade Nxesi, published, by way of Government Gazette, the 'Consolidated COVID-19 Direction on Health and Safety in the Workplace' ("**Direction**"). The Direction replaces the Direction published on 29 April 2020 ("**Old Direction**"). The Direction can be accessed at:

<http://www.labour.gov.za/DocumentCenter/Regulations%20and%20Notices/Regulations/Occupational%20Health%20and%20Safety/Directions%20for%20Health%20and%20Safety%20in%20the%20Workplace%20-%204%20June.pdf>.

We have highlighted below some of the key developments and changes. In essence, the Direction maintains a number of the provisions in the Old Direction while making minor amendments, clarifications and further additions. The Direction makes reference to a number of guidelines which must be considered in conjunction with the Direction. The summary which follows deals with some of the major changes for employers employing more than 10 employees.

Vulnerable employees

A "vulnerable employee" is defined as an employee, as contemplated in the Department of Health Guidelines ("Department"),^[1] with known or disclosed health issues or comorbidities or any other condition that may place the employee at a higher risk of complications or death than other employees if infected with COVID-19 or employees above the age of 60 years who are at a higher risk of complications or death if infected.

Every employer is obliged to take a number of administrative measures which include, among others, taking special measures to mitigate the risk of COVID-19 for vulnerable employees. These measures must be in accordance with the guidelines issued by the Department.^[2]

Plans for reopening workplaces

The Directions require every employer who can operate to conduct a risk assessment and to develop a return to work plan based on that assessment.

The plan must include the protective measures in place for the phased return of the employees before opening. The employer must consult on the risk assessment and plan with –

- any representative trade union as contemplated by section 14(1) of the Labour Relations Act, 1995 (Act No. 66 of 1995); and
- any health and safety committee established in terms of section 19 of OHS&A; or
- in the absence of such a committee, a health and safety representative designated in terms of section 17(1) of OHS&A or employee representative.

The plan must be made available for inspection by an inspector and a person contemplated above. The plan must include:

- the date that the workplace will open and the hours of opening;
- a list of employees permitted to return to work and those who are required to work from home;
- the plan and timetable for the phased-in return of employees to the workplace;
- identify vulnerable employees;
- ways of minimizing the number of workers at the workplace at any one time;
- the workplace protective measures required to be taken in terms of this Direction and any sectoral guideline to get the workplace COVID-19 ready;
- the measures for the daily screening of employees and the screening of clients, contractors and visitors to the workplace; and
- the details of the COVID-19 compliance officer (discussed further below).

The employer must phase the return of their employees to work in accordance with the plan.

Administrative measures

The Directions provide for administrative measures that the employer must establish. Below is a summary of some key additions to the Old Direction.

Addition of time period

The Old Directions provided that an employer who employs more than 500 employees must submit a record of its risk assessment and a written policy concerning the protection of the health and safety of its employees from COVID-19 as contemplated in section 7(1) of the OHS&A to the Department of Employment and Labour. The Directions now also make it clear that these documents must be submitted within 21 days of the commencement of the Direction.^[3]

Compliance officer

Every employer must appoint a COVID-19 compliance officer. The officer's additional obligations are to:

- oversee the implementation of the plan; and

- **oversee the adherence to the health and safety measures established in the workplace to give effect to requirements of the Direction including appointing employees to perform this function if the employer has more than one workplace.**

The officer remains obliged to address employee or workplace representative concerns and to keep them informed and, in any workplace in which a health and safety committee has been elected, consult with that committee on the nature of the hazard in that workplace and the measures that need to be taken.

The requirements placed on the compliance officer are consistent with the provisions of the Regulations to the Disaster Management Act ("Regulations") which require, among others, that a compliance officer must be appointed to "develop measures to ensure that the workplace meets the standards of health protocols, adequate space for employees and social distancing measures for the public and service providers, as required."

Closure due to infection

If a worker has been diagnosed with COVID-19, an employer must determine the need to temporarily close the affected work area for decontamination using an incident-based risk assessment with due regard to the Department of Health's Guidelines.^[4]

Health and safety measures

Surgical mask

If a worker presents with COVID-19 related symptoms or advises the employer of these symptoms, the Direction no longer specifies that a FFP1 surgical mask is required. The Directions now state that a surgical mask must be provided to the worker (which presumably can be a surgical mask other than a FFP1 mask).

Return to work after COVID-19 diagnosis

The Direction has added conditions on when a worker may return to work after they have been diagnosed with COVID-19. The conditions are as follows (new conditions are highlighted):

- **the worker has completed the mandatory 14 days of self-isolation;**
- **the worker has undergone a medical evaluation confirming fitness to work if the worker had moderate or severe illness;**
- the employer ensures that personal hygiene, wearing of masks, social distancing, and cough etiquette is strictly adhered to by the worker;
- the employer closely monitors the worker for symptoms on return to work; and
- **the worker wears a surgical mask for 21 days from the date of diagnosis.**

Worker has been in contact with COVID-19 positive worker in the workplace

If a worker has been in contact with another worker in the workplace who has been diagnosed with COVID-19, the employer must assess that worker's exposure in accordance with the Department of Health's Guidelines^[5] to ascertain whether the exposure carries a high or low risk of transmission between the workers.

If there is a low risk of exposure, the employer:

- may permit the worker to continue working using a cloth mask complying with standard precautions; and
- must monitor the worker's symptoms for 14 days from the first contact.

If there is a high risk of exposure:

- the worker must remain in quarantine for 14 days; and
- the employer of that worker must place the worker on sick leave in accordance with the Direction for that period.

Measures in respect of workplace to which public have access

Depending on what is reasonably practicable given the nature of the workplace every employer must do the following (additions highlighted):

- **determine the floor area of the workplace in square metres in order to determine the number of customers and workers that may be inside the workplace at any one time with adequate space available;**
- arrange the workplace to ensure that there is a distance of at least one and a half metres between workers and members of the public or between members of the public; or
- put in place physical barriers at **counters** or provide workers with face shields or visors;
- if appropriate, undertake symptom screening measures of persons other than its employees entering the workplace with due regard to available technology and any guidelines issued by the Department of Health;
- if appropriate, display notices advising persons other than employees entering the workplace of the precautions they are required to observe while in the workplace;
- require members of the public, including suppliers, to wear masks when inside their premises;
- **take steps to ensure that customers queuing inside or outside the workplace are able to maintain a distance of one and half metres from each other;**
- **provide hand sanitizer for use by the public at the entrance to the workplace; and**
- **assign an employee as a compliance officer to ensure that these measures are complied with and that all directions in respect of hygienic conditions and limitation of exposure to persons with COVID-19 are adhered to.**

Refusal to work due to exposure to COVID-19

An employee may refuse to perform any work if circumstances arise which with reasonable justification appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to COVID-19. The Direction regulates a number of issues flowing from any such action on the part of the employee including efforts to resolve the issues. Where an employee refuses to work

there is an obligation on such employee to inform the employer. It also provides for certain protections for employees who utilise the right to refuse to work. These protections include the following:

- No employer may make any deduction from an employee's remuneration, or require or permit an employee to make any payment to the employer or any other person, in respect of anything which the employer is obliged to provide or to do in terms of this Direction;
- No person may threaten to take any action against a person because that person has exercised or intends to exercise the right to refuse to work; and
- No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work.

Sector protocols and guidelines

Sectoral or industry associations must, in the event of high health risks, develop sector-specific health protocols in consultation with the Department of Health to limit the spread of COVID-19 in the sector including providing for those circumstances where a firm within the sector cannot stagger working hours or provide transport for its employees.

[1] http://www.nioh.ac.za/wp-content/uploads/2020/05/20_2020-V4.-Guidance-on-vulnerable-employees-and-workplace-accommodation....pdf

[2] http://www.nioh.ac.za/wp-content/uploads/2020/05/20_2020-V4.-Guidance-on-vulnerable-employees-and-workplace-accommodation....pdf

[3] It is still a requirement for the employer to submit the records to its health and safety committee established in terms of section 19 of OHSA.

[4] http://www.nioh.ac.za/wp-content/uploads/2020/05/guidelines_positive_worker_19_May_20.pdf

[5] <http://www.nioh.ac.za/wp-content/uploads/2020/04/Guidance-for-symptom-monitoring-and-management-of-essential-staff-with-COVID-19-related-illness-final.pdf>



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