

EMPLOYMENT

The management of COVID-19 in the workplace

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COVID-19 in the workplace

On 4 April 2022, the Minister of Cooperative Governance and Traditional Affairs (“the Minister”) terminated the national state of disaster. In doing so, the Minister repealed all regulations and directions made in terms of section 27(2) of the Disaster Management Act 57 of 2002, save for the below-mentioned provisions:

- Regulation 67 – Mandatory Protocols when in a Public Place
- Regulation 69 – Gatherings
- Regulation 75 – Partial Reopening of Borders
- Regulations 4(5) and (10) – The Social Relief and Distress Grant
- Chapter 8 – The Covid-19 Vaccine Injury Compensation Scheme
- Regulation 4(7)(b) – The extension of the period validity for various driving and motor-related licences

With specific reference to the management of COVID-19 in the workplace, the Amended Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (“**Direction**”) is no longer applicable. The Code of Practice: Managing Exposure to SARS-CoV-2 in the Workplace, Government Notice No. 46043 (“**the Code**”) under the Labour Relations Act, 66 of 1995 (“**LRA**”) is now in effect.

The Code aims to provide guidance to employers in conducting or updating a workplace risk assessment in terms of the Occupational Health and Safety Act (“**OHS**”) and Hazardous Biological Agents Regulations, 2022 (“**HBA Regulations**”) in relation to exposure to COVID-19. A recently published update of the HBA Regulations can be accessed [here](#).

The Code further aims to govern the development and implementation of a plan concluded on the basis of a completed risk assessment in a workplace. This includes, among others, managing absence from work due to infection, isolation, adverse effects of vaccination, and accommodating employees who refuse or fail to vaccinate against COVID-19.

We set out below some of the notable differences between the Code and the Direction.

Administrative Amendments

The Direction required that employers notify their employees that, if they are sick **or** have symptoms associated with COVID-19 (not as a result of a COVID-19 vaccination) that they must: (i) not come to work; and (ii) must take paid sick leave in terms of section 22 of the Basic Conditions of Employment Act 75 of 1997 (“**BCEA**”); The Code instead requires that workers who are **both** symptomatic **and** have been diagnosed with COVID-19 inform their employers of such status. Upon notification, the placement of the employee on sick leave in terms of section 22 of the BCEA still applies.

The Code prescribes that if an employee informs their employer that they experience COVID-19-related symptoms, the employer may require the employee to be tested for COVID-19 before permitting the employee to enter the workplace or to report for work. This does not apply to workers who report the presence of COVID-19 symptoms between one to three days after vaccination.

Risk Assessment Provisions

Under the Direction, it had been mandatory for the risk assessment and plan to account for various items including, amongst others:

- The daily screening of employees, clients, contractors, and visitors to the workplace;
- The workplace protective measures required to be taken in terms of the Direction and any sectoral guideline to get the workplace 'COVID-19 ready'; and
- The employee's rights to bodily integrity as well as their right to freedom of religion, belief, and opinion.

It is no longer mandatory to account for the above under the Code.

However, an employer **may** do so. What is instead required is that plans produced on the basis of a risk assessment make provision for the isolation of employees who have been diagnosed with COVID-19 **and** are symptomatic.

The initial mention of the rights of employees to bodily integrity in section 12(2) and the right to freedom of religion, belief, and opinion in section 13 of the Constitution in the Direction, has been omitted from the Code. The mere fact that the Code does not mention the constitutional rights listed in the Direction does not remove the possibility that they may still be raised.

The Code does provide that if an employee produces a medical certificate attesting that they hold contra-indications for vaccination, the employer may "refer the employee for medical examination at the employer's expense". In the instance where the employer accepts the medical evaluation, the employer must accommodate the employee in a position that does not require vaccination.

The Direction provides that an employer who employed more than 50 employees had been under the obligation to submit a record of its risk assessment to its relevant health and safety committee and to make a copy available to the health and safety representatives appointed in terms of the OSHA and the Inspectors of the Department of Employment and Labour ("**Inspector**"). In contrast, the new Code informs that every employer's risk assessment and plan be made available for inspection by a relevant trade union, health, and safety committee or representative, and an Inspector.

COVID-19 in the workplace – Small Businesses

Employers who employ 20 or less persons (previously 10 or less employees) only have to take certain steps in terms of the 'Small Businesses' provision in the Code. This includes *inter alia* the completion of a risk assessment, taking reasonably practical measures to mitigate the risk of infection or transmission of COVID-19 in the workplace, refusing to allow an employee who has COVID-19 symptoms to access the workplace and making provision reasonable ventilation in closed spaces in the workplace.

Boosters

The definition of 'vaccination' in the Code has been amended to include additional doses and so-called 'booster doses'.

HBA Regulations

Under the Code, workplace protective measures are required to be taken in terms of the new HBA Regulations adopted under the OSHA. This includes adhering to guidelines for ventilation in the workplace to prevent the spread of COVID-19. The Code further provides that the ventilation of the workplace be adhered to in terms of Regulation 5 of the Environmental Regulations for Workplaces and the HBA Regulations.

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