WERKSMANS
ATTORNEYS

EMPLOYMENT

Update to COVID-19 Temporary Employer / Employee Relief Scheme (TERS) benefits

27 May 2020 *4 min read*

By Andre van Heerden, Senior Associate; Jacques van Wyk, Director, Bradley Workman-Davies, Director; and Thabisa Yantolo, Candidate Attorney

On 26 May 2020 the Minister of Employment and Labour, Thembelani Waltermade Nxesi, ("**Minister**") published amendments to the COVID-19 Temporary Employer / Employee Relief Scheme ("**TERS**") Directives. The amendments are effective from 26 May 2020.

Extension of who may apply

The amendments entitle a **worker** to the TERS benefit if they are a contributor or an employee as defined in the Unemployment Insurance Act ("**UI Act**") who should have received benefits under the COVID-19 TERS Directive but for circumstances beyond their control did not. These include:

- if the employer failed to register as an employer in contravention of section 10(1) of the Unemployment Insurance Contributions Act No. 4 of 2002 ("**the UIF Act**"); or
- the employer failed to provide details relating to the employees in contravention of section 10(3) of the same act and therefore the employee was not registered as a contributor;
- or the employer failed to pay the contributions contemplated in section 5(1) of the UIF Act in respect of that employee.

On 16 April 2020 the Minister issued amendments to the directives governing the COVID-19 TERS. The TERS directives now provide:

Annual leave taken during the lockdown

If an employer has required an employee to take annual leave during the lockdown in terms of section 20(1)(b) of the Basic Conditions of Employment Act, 75 of 1997 ("**the BCEA**") then it may set off any amount received from the UIF under the TERS scheme against the amount paid to the employee in respect of annual leave. The employee must then be credited with the proportionate entitlement to annual leave in the future.

The wording of the new section seems to restrict this set-off only to employers who have placed employees on **compulsory** annual leave. We do not believe that this is the purpose of this amendment and that any employer which has placed or allowed employees to use their annual leave entitlement during the lockdown, should apply the set-off.

A full accounting of the leave used, the leave credited, the value of the leave and the value of the set-off must be maintained to demonstrate to the UIF that lawful set-off has taken place.

Employer's obligation to apply for the TERS benefit

The directives now make it clear that should an employer close all or part of its operations as a result of the COVID-19 pandemic for 3 (three) months or less period then **the employer must apply for the TERS COVID-19 benefits on behalf of its affected employees**".

This obligation flows from the impact **of social distancing and the need to avoid in person individual employee applications at Department of Labour**. The "must apply" wording does not mean that an employer has no choice, and always has to apply for the TERS

COVID-19 benefit; instead, if the COVID-19 benefit is applicable to its employees, the employees cannot apply in their individual capacity and the employer must do so on their behalf.

The obligation to apply for the TERS COVID-19 benefit would only arise where the employees are not being paid their full salary (either in whole or in part) or have been placed on annual leave.

Advances on the TERS COVID-19 benefit

The directives now provide that employers are urged to pay employees their TERS COVID-19 Benefit in advance, and then to offset the advance payment against the payments from UIF"

How to account for advances on the TERS COVID-19 benefit

We have enquired from the UIF how an employer must disclose to the UIF that it has paid its employees an advance on their TERS COVID-19 benefit. The UIF have informed us that if it is an advance payment, there only needs to be an agreement between the employer and the employee. The UIF also advised that the employer should rather not include the advance payments in the prescribed template under 'remuneration during shutdown' as this would be deemed a salary payment. Rather, the employer should merely keep all necessary records that would indicate that the payment made was an advance payment and the TERS COVID-19 benefit was used to settle the payment. The employer must be able to provide these records if the UIF audits them.

If the payment is a gratuitous payment, the UIF indicated that this must be disclosed in the 'remuneration during shutdown' column in the prescribed template.

Should you require formal advice on any of the issues mentioned herein, please contact us.

Andre van Heerden

Director

View Profile

Jacques van Wyk

Director

View Profile