

EMPLOYMENT

Urgent update: COVID-19 Temporary Employer / Employee Relief Scheme (“TERS”) benefit clarification

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On 13 August 2020 the Minister of Employment and Labour, Thembelani Waltermade Nxesi, (“**Minister**”) published the COVID-19 TERS Direction (“**Direction**”). The Direction will be deemed to have commenced on 27 June 2020 and will apply until 15 August 2020. Please see our previous article which dealt with the Direction in more detail at: <https://werksmans.com/legal-updates-and-opinions/urgent-update-covid-19-temporary-employer-employee-relief-scheme-ters-2/>.

The Department of Employment and Labour have also released a guidance note on the Direction and an updated Frequently Asked Questions on the TERS application procedure (“**FAQs**”). These documents can be accessed at: <http://www.labour.gov.za/easy-guide-for-employers-on-covid19>.

The Direction has clarified, in a number of respects, who can benefit from TERS. In this regard the following should be noted:

Closure of Business

Where a business has, by virtue of the lockdown regulations, been unable to operate, totally or partially, then the employees of that business can claim benefits if they have as a result been laid off, entirely or partially. The Direction clarifies that the reason for the closure must be linked specifically to the lockdown regulations (in other words, the business must have been barred from operating at any given time in terms of such regulations). It is also clear that the business need not show financial distress in order for its employees to obtain a benefit in terms of TERS.

Economic, Technical and / or Structural Needs

The Direction now permits employees whose employers are “unable to make use of their services **either fully or partially** because of **operational requirements based on the economic, technological, structural or similar needs** of the **employer** caused by **compliance with the Regulations** made in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) **or directions made under regulation 4(10)** of those Regulations **in particular** the need to limit the number of employees at the workplace through rostering, staggering of working hours, short time, and the introduction of shift systems” (emphasis added) to apply for TERS. Arising from this formulation, the following questions must then be asked as an employer:

- has compliance with the regulations and / or directions resulted in economic, technological, structural and / or similar needs; and
- Have those needs resulted in an inability to utilise employees, either fully or in part.

If the answer to both of the above questions is yes then the employees so affected may be entitled benefit in terms of TERS. For example, an employer who is required to limit the number of employees in their shop in order to comply with the Occupational Health and Safety Direction (“**OHS Direction**”) will be able to apply for TERS benefits on behalf of the employees who could not work.

It is not clear whether the Direction applies if an employer can operate but its customers or clients cannot due to the regulations resulting in a decline in business and need for a full staff complement. It is also not clear whether the Direction applies to businesses who need to lay off employees because the economy has contracted due to the impact of the lockdown.

Vulnerable Workers

The Direction introduces the notion of ‘vulnerable workers’ who are defined as employees “(a) with known or disclosed health issues or comorbidities or any other condition that may place the employee at the higher risk of complications or death than other employees infected with Covid-19 or (b) above the age of 60 years who is at a higher risk of complications or death if infected.” This definition is consistent with that in the OHS Direction.

The Direction provides that if an employer is unable to make alternative arrangements for vulnerable employees to work from home or adopt other measures to assist them then such employees are entitled to a TERS benefit. “Other measures” is explained in clause 20.3 of the OHS Direction which requires that “employers take special measures to mitigate the risk of COVID-19 for vulnerable employees in accordance with the Department of Health’s Guidelines to facilitate their safe return to work or their working from home.” The reference to Department of Health Guidelines is a reference to the ‘Guidance on vulnerable employees and workplace accommodation in relation to COVID-19.’ The guideline can be accessed at: <https://www.nioh.ac.za/>.

In the past it was never made clear that TERS would be available to employees who, through no fault of their own, could not return to work due to their status as a vulnerable employee. The Direction now goes some way to clarify this issue. Vulnerable employees are entitled to benefits in circumstances where they cannot be accommodated by their employer.

Conclusion

The Directive has introduced clarity and, in some instances, expanded upon the class of employees who may be entitled to benefits in terms of TERS. It is clear now that where an employer cannot accommodate vulnerable workers an employer can claim TERS on behalf of such employees. It is also clear that where an employer cannot make use of its employees, either fully or at all, due to having to comply with the regulations / directions and, as a result, those employees are laid off, then an employer may claim TERS on behalf of such employees.



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