

Working from home but are you really at work?

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COVID-19 has revolutionised the workplace in terms of health and safety standards. Never before have employers had to manage their workplaces as delicately as under the current situation, which has forced most of the world to work remotely where possible. South Africa is no different and although we may be three months out of our "hard lockdown", we are still far from being completely free from the impact of COVID-19.

COVID-19 has forced businesses to do a lot of adapting to embrace the so called "new normal", where social distancing is mandatory and sanitisers are at every corner the eye can reach. However, not all businesses have the luxury of social distancing or placing employees in individual offices. As such, the next best thing has been to place employees on a roster system or allow them to work from home completely.

This new way of work presents a practical problem for employers. In particular, how does an employer manage those employees who are working from home? Are workplace rules, standards and policies applicable to those employees and can an employer enforce them? To answer these questions we have to look at what we mean when we talk about the "workplace". Section 213 of the Labour Relations Act No.66 of 1995 ("LRA") defines "workplace" as follows:

"...(c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation."

A practical understanding of the above definition can be gleaned from case law that has interpreted the provision. For example, the Constitutional Court in ***Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] 7 BLLR 641** held as follows:

"[24] Two things are immediately notable about the way the statute defines "workplace". The first is its focus on employees as a collectivity. The second is the relative immateriality of location. Both signal that "workplace" has a special statutory meaning." [our emphasis]

"[25] First, "workplace" is not the place where any single employee works – like that individual's workshop or assembly line or field or desk or office. It is where "the employees of an employer", collectively, work. The statute approaches the concept from the point of view of those employees as a collectivity. This accords with the role the term "workplace" plays in the LRA. This sees workers as a collectivity, rather than as isolated individuals. And that in turn squares with the statute's objects. The promotion of orderly bargaining by workers, collectively, is one of the statute's express primary objects. That the focus of the definition of "workplace" is on workers as a collectivity rather than as separate individuals fits." [our emphasis]

"[26] The second point follows. It is that location is not primary: functional organisation is. The definition encompasses one or more "place or places where employees of an employer work". This means that "the place or places" where workers work may constitute a single workplace. That entails the intrinsic possibility of locational multiplicity for a single "workplace". Right at the outset this eliminates any notion, which the ordinary meaning of "workplace" might encourage, that each single place where a worker works is a separate "workplace." [our emphasis]

The above interpretation by the Court is clear. The test is one of functional organisation and not location per se. As such, an employee's environment must constitute an independent operation in terms of size, function or organisation for it to constitute a "workplace" in terms of the LRA. Furthermore, there must be an element of workers as a collectivity.

Consequently, a person's home cannot be construed to be a "workplace" in terms of the LRA. Taking this view, an employer cannot enforce its workplace rules and standards on an employee who is working from home. For example, an employee may not have to adhere to a dress code. Although generally minor in terms of forms of misconduct, extremes are also possible such as; consuming alcoholic beverages or being at "work" whilst inebriated or under the influence of narcotics. The employer may have recourse with regards to such an employee for example, under incapacity if that is the case. However, should such conduct not result in incapacity or any other consequence such as the commission of a crime which may warrant disciplinary action, misconduct charges may not be visited upon the employee.

What we have canvassed above is not only limited to misconduct and disciplinary action, but other employer-employee related issues such as health and safety in the workplace. The Occupational Health and Safety Act No.85 1993 ("OHSA") requires an employer to provide and maintain a workplace that is safe and risk-averse when it comes to the health and safety of its employees. This must be done as far as reasonably practicable, and includes ensuring that the workplace is free from harmful substances and other hazards. Should that not be possible, then an employer is obligated to warn its employees of these potential harms and hazards whilst still providing protective measures and information on how to prevent and minimise the potential harm.

A current example is work under COVID-19. Those who are required to attend physically at work are provided with protective measures such as face masks and sanitisers and employers are further required to educate employees on how to minimise the risk of the spread of the virus. The application of the same standards presents some difficulty when regard is had to the definition of workplace under the OHSA. Workplace is defined as "any premises where a person performs work in the course of his employment". This has the potential to be construed widely because an employee may be required to work in any number of places during the course of their employment. However, viewed constructively, we do not think that a person's home can be one such place. The OSHA, much like the LRA, does not make provision for a situation such as the current. For example, how does an employer ensure that an employee's home is free from harmful substances and dangers? As the OHSA provides, employers are required to go as far as reasonably practicable in ensuring their employees' health and safety at the workplace. It cannot be said to be reasonably practicable for an employer to extend its obligations under legislation as set out above to an employee's home.

A further example of the gap in our legislation is the Basic Conditions of Employment Act No.75 of 1997 ("BCEA"), which defines "work-place" as "any place where employees work". Wholly considered, it is clear that this too conceptualises the workplace as a place where employees assemble as a collective.

Consequently, it is clear that the remote work arrangement presents a labour relations conundrum for employers. Labour legislation as it is, does not fully cater for the situation we are in. A development of the law is necessary not only to adapt to the current situation but also to be forward thinking and cater for an environment we may find ourselves in sooner rather than later. An environment where work from home options are the norm and the workplace is no longer simply where the employees of an employer work, collectively.



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