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EMPLOYMENT

Working in a pandemic: what is a safe and healthy workplace?

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An employer which has been issued a permit as a provider of essential goods or services is legally entitled to continue operations during the National Shutdown Period. This is in terms of the recently released and constantly updated regulations, which were initially published on 25 March 2020 by the Minister of Cooperative Governance and Traditional Affairs, as regulations to the Disaster Management Act, and which were amended for the fourth time on 2 April 2020. These regulations set out, in section 11A and Annexure B (Categorisation of Essential Good and Services during Lockdown, Regulation 11A), the types of services and goods regarded as 'essential' ("**Essential Services Regulations**"). However, as reported in the media, a number of businesses which continue to operate are facing the scrutiny of enforcement officers, not only in regard to whether they have the correct legal authorisation to continue to operate, but also whether the workplace is safe for its employees.

The Essential Services Regulations might be expected to, but do not set out or provide any clarity as to what steps an essential services employer must take in order to ensure the safety of its employees who are required to work during the lockdown. The Essential Services Regulations refer to "hygienic conditions and the limitation of exposure of persons to COVID-19", but stop at that point and go no further to define what constitutes "hygienic conditions". The only specificity comes in relation to retail operations, in which customers must be provided with "adequate space". "Adequate space" means "*not more than one person per square metre of floor space*".

As such, although there may be an expectation on the part of enforcement offices that staff must be provided with masks or gloves, there are in fact no hygienic requirements set out in the Essential Services Regulations which requires an essential services or goods employer to take any specific steps to ensure that the workplace is hygienic, and no legal obligation to provide masks, gloves or hand sanitizers to employees.

The only further restriction on operations, under the Essential Services Regulation, is that the Head of Institution (the CEO or equivalent, of a private business) must restrict staff to only those essential staff necessary to provide the essential goods or services. If an employee is not needed to provide the essential goods or services, they should not be allowed to attend at the workplace.

Whilst the Essential Services Regulations are currently the primary focal point of the requirements for an essential services or goods employer, the Occupational Health and Safety Act (OHSA) still remains in place and is relevant, and employers have the following duties and obligations, to employees and other persons, as prescribed by section 8 and 9 of OHSA:

- To provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees;
- To take reasonably practical steps to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment; and
- To conduct its undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in its employment who may be directly affected by its activities are not exposed to hazards to their health or safety.

Again, OHSA provides no specificity in relation to what is required to create a safe working environment in light of the Covid19 pandemic. An employer must however, ensure that it complies with its general legal obligations under OHSA, and would in the current situation still be required to assess its particular working environment, in order to determine whether hygiene measures such as hand sanitiser or hand

sanitising stations, gloves, masks, thermal monitoring of employees on entry to premises, and/or special ventilation and/or High-Efficiency Particulate Air (HEPA) air conditioning systems, may be required.

As long as an essential goods or services employer limits staff to essential staff and provides adequate space, it is compliant with the Essential Services Regulations.



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