

COVID-19: MUST EMPLOYEES BE PAID DURING LOCKDOWN?

The President recently announced a nation-wide lockdown in South Africa for 21 days from midnight on Thursday 26 March 2020 until midnight on Thursday 16 April 2020. Under lockdown, people will need to stay at home and will not be allowed to leave their homes except under strictly controlled circumstances, such as to seek medical care, buy food, medicine and other supplies or collect a social grant.

Certain categories of business will be permitted to remain open and certain categories of people will be exempted from the lockdown. The full list of essential businesses and personnel has not yet been published and we understand that this list is currently being finalised and should be made available to the public today.

Where they are not included in the list of "exempt businesses" or where employees are not "key employees", the President has confirmed that companies who are able to continue their operations remotely should do so.

The effect of the lockdown is that many businesses will need to close and employees will not be able to go to work. Many employers are asking whether they need to continue to pay their employees in these circumstances.

In our assessment, during the lockdown there will be three categories of employees:

1. employees in **essential businesses** or those in non-essential businesses who perform essential functions, i.e. **key persons**, who would **continue to work** and should **continue to be paid**;
2. employees who are **not in essential businesses** but who **can work remotely**, and who would accordingly **continue to be paid**; and
3. employees who are **not in essential businesses** and who are **not key persons** and who **cannot work remotely**.

Employees in non-essential businesses who are not key persons and who cannot work remotely

The issue in relation to payment arises in relation to this category of employee. In our view, there is no legal obligation to pay these employees. The employer's obligation to pay arises from the employee's ability and willingness to tender services. During the national lockdown period, the employees cannot and may not work – not because the employer requires that they do not work, but because of the lock down order issued by government. (This situation is different from the case where the employer requires the employee not to be at work because of a reasonable apprehension of harm in that the employee had been in contact with someone who tested positive for Covid-19, or presents with flu-like symptoms. Here it is the employer that requires the employee to be absent on the basis of the employer's duty to ensure a safe and healthy work environment. In these circumstances, the absence should be paid, unless agreed otherwise.)

As regards employees who cannot work during the lock-down period, of course, if the employer can afford to pay the employee, it may decide to do so, and pay her/his full remuneration or a portion thereof as a "lock down allowance" of sorts; or grant the employee a loan to be recovered in due course. It is also permissible to require the employees to take (paid) annual leave.

What happens after the lock-down ends?

We emphasise that this "no-work, no-pay" principle would only apply during the government mandated lockdown period and, in our view, would not continue to apply after the lockdown ends. If employers wished to

continue the temporary lay-offs after the lock-down, this would need to be agreed with employees. In this regard, the employer would have two options, namely (a) to commence a retrenchment consultation process and explore short time or temporary lay-offs as a an alternative to forced retrenchment; or (b) to resort to industrial action and make an employer-demand and if not accepted, impose a lock-out in accordance with the provisions of the Labour Relations Act.

UIF relief

If employers are unable to pay their employees during the lockdown, they may be able to claim benefits from the Unemployment Insurance Fund. We understand that the government is currently working on measures to try and alleviate the economic distress caused to employees by the lockdown and that support may be offered through the UIF. So far, the UIF has issued guidelines that provide, *inter alia*, for benefits to be made available to employees where a company shuts down for a certain period or if employees are required to work reduced/short time. Further, if an employee has been "quarantined" for 14 days, it seems that s/he will be also entitled to claim "special leave" benefits from the UIF.

We understand that the discussions regarding the additional UIF benefits are ongoing and we anticipate more clarity, particularly regarding payment systems, in due course.

Given that things are developing so quickly, we encourage our clients to access all our latest newflashes from our firm's homepage or through this link: <https://www.bowmanslaw.com/coronavirus-pandemic>

If you have any queries, please contact our Employment and Benefits Practice.