



CIRCUMSTANCES SURROUNDING COVID-19 ARE DYNAMIC AND EMPLOYERS NEED TO BE AGILE. ADVICE PROVIDED IS ADAPTED WITH THE EVER-CHANGING DEVELOPMENTS.

THIS EDITION:

- SOME INITIAL CONSIDERATIONS
- EMPLOYERS PERFORMING AN ESSENTIAL SERVICE
- EMPLOYERS WHO CONTINUE TO OPERATE WITH EMPLOYEES WORKING REMOTELY
- EMPLOYERS IMPLEMENTING A SHUTDOWN: THE DO'S AND DON'T'S

NATIONAL SHUTDOWN AND EMPLOYER / EMPLOYEE CONSIDERATIONS

During this time of uncertainty, we thought it helpful to set out some of the remedies available to employers and that can be used to mitigate the financial hardships on both employers and employees during the national lockdown and the significant future.

The suggested options set out below may not be suitable for every employer, and careful consideration needs to be given to the individual circumstances of each organisation. Certain options may also require the input of employees through consultation and may accordingly, only be discussed and implemented on return to the workplace.

SOME INITIAL CONSIDERATIONS:

- Are you performing an essential service, as per the government regulations?
- Are you able to continue working remotely during the national lockdown?
- Are you contemplating a total shutdown during this period, or partial reduction in working hours i.e. placing employees on short time?
- Are you able to continue paying employees, either in part or fully, during this time?

The answer to these questions will determine the most suitable option available to you as an employer.

EMPLOYERS PERFORMING AN ESSENTIAL SERVICE

- It is conceivable that it is business as usual.
- Businesses are operational and employees tender their services.
- All employees are paid their normal salary and all benefits.
- But it may be that certain employers are operating reduced hours or in a dramatically different way. This may involve reduced working hours or short time implementation and employees may need to apply for UIF reduced working time benefits.
- The UIF reduced work time benefits scheme permits employees to recover from UIF the difference between what is paid by the employer and the employee's unemployment benefits under UIF (and subject to certain conditions and up to a maximum amount).

EMPLOYERS WHO CONTINUE TO OPERATE WITH EMPLOYEES WORKING REMOTELY

- Again, it is conceivable that it is business as usual. However, it may be that only certain positions within the organisation are able to continue working. As a result, the employer has a hybrid of those employees who continue to work and a partial shutdown of other operations, with employees not able to work at all.
- For those employees who are able to work remotely and to a satisfactory standard, employees are paid their normal salary and all benefits.
- Where certain employees are working reduced hours (even remotely), employers would be entitled to pay employees a reduced a salary and linked to hours actually worked or productivity based.
- This may also involve reduced working hours or short time implementation and employees may need to apply for UIF reduced working time benefits. The extent of this need will depend on how substantial the salary cut may be

EMPLOYERS IMPLEMENTING A SHUTDOWN: THE DO'S AND DON'T'S

- The overriding and fundamental concept in our law is one of no work, no pay.
- This applies no matter how willing and able an employee is to work, or an employer is to keep operating. In circumstances, where the employee cannot work, the employer is not obligated to keep paying the employees.
- The employer is however, encouraged to investigate methods of alleviating the burden on employees. We look into these options below.

EMPLOYER'S WITH FINANCIAL MUSCLE: Can you continue to pay employees?

- Can you as the employer continue to pay employees during the lockdown? If so, how much and for how long?
- It may be that salary reduction and other payment arrangements are concluded with employees during this time. Provided agreement is reached with employees, the employer would be in a position to pay reduced salaries and may implement a recovery package, whereby employees undertake to pay back any advances over a period of time.
- It may also be possible for employers to continue maintaining contributions to employee medical aid and/or pension or provident schemes with an undertaking by the employee to repay these advances.

ANNUAL LEAVE UTILISATION: May an employer require an employee to use annual leave?

- The short answer is yes.
- The BCEA recognises certain forms of leave which depending on the circumstances may be utilised by employers to ease the burden on employees during the lockdown.
- Accordingly, an employee may (in the absence of a specific leave agreement) be requested by the Employer to take paid annual leave against the employee's annual leave credits.
- Furthermore, by employees utilizing their annual leave, it ensures that all their benefits and contributions can continue to be made.

EMPLOYERS WHO CANNOT FINANCIALLY AFFORD TO PAY EMPLOYEES, EITHER THROUGH NORMAL PAYROLL OR UTILISING ANNUAL LEAVE: Can we implement a temporary lay-off?

- Employers who find themselves in this position may implement a temporary lay-off as a result of the national lockdown and claim UIF benefits for employees through the UIF mechanism available to all employers and employees.
- Employers may make use of the COVID-19_TERS benefit scheme:
 - Should an employer as a direct result of Covid-19 pandemic close its operations for a 3 month or lesser period and suffer financial distress, the employer shall qualify for Covid-19 temporary relief benefit.
 - The UIF benefits will only pay for the cost of the salary for the employees during the temporary closure of the business operations, and these benefits will be a portion
 - The salary benefits will be capped to a maximum amount of R17 712.00 per month, per employee and an employee will be paid in terms of the income replacements rate sliding scale (38% to 60%) as provided in the UI Act.
 - Employers make application for the benefits on behalf of the employees.
- For the employer to qualify for the temporary financial relief scheme, it must satisfy the following requirements:
 - The employer must be registered with UIF;
 - The employer must comply with the application procedure for the financial relief scheme; and
 - The employer's closure must be directly linked to the Covid-19 pandemic.

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EMPLOYERS WHO CANNOT AFFORD FINANCIALLY TO PAY EMPLOYEES – can the employer retrench?

- In theory, employers can retrench employees during the lockdown as there exists a sound rationale as required by S189 and S189(A) of the Labour Relations Act (LRA).
- However, S189 of the LRA requires that an employer must consult affected employees and/or their representatives, and the parties must engage in a meaningful joint consensus seeking process in respect of attempting to reach consensus on various issues set out in S189(2). This requirement may be impossible to comply with during the national lockdown.
- Furthermore, S189 requires employees be given notification of and certain information related to the contemplated retrenchment in writing, and this may prove difficult in respect of employees who do have access to electronic means of communication or data.
- In the event that the employer is able to communicate with employees electronically, and some form of consultation is initiated, and the process is regulated by S189A, employees have the right to request CCMA facilitation. The CCMA has closed its offices and it is uncertain whether a retrenchment facilitation would be considered urgent by the CCMA to justify its intervention.
- Our advice is therefore, for employers to temporarily shut down operations which will permit employees to claim UIF benefits during the period of lockdown or thereafter while operations remain suspended, and then once the national lockdown is uplifted, engage in a retrenchment process as contemplated by S189 and S189A.
- Accordingly, it is our advice that employers avoid embarking on retrenchment processes during the lockdown and rather explore all the government funding schemes and relief available, including but not limited to UIF relief schemes.