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NATIONAL LOCKDOWN: OPTIONS FOR DISTRESSED EMPLOYERS

Introduction

1. On 18 March 2020 we posted a [Practical Guide for Employers](#) on the critical steps they could take in order to manage the coronavirus pandemic.
2. There have been a number of significant developments since then, most notably the implementation of a National Lockdown from midnight on 26 March 2020 until 16 April 2020. This has resulted in the closure of most businesses for that period and potentially beyond that if the Lockdown is extended.
3. While we applaud the President for prioritising public health and acting in a bold and decisive manner, the adverse economic impact of the decision on many businesses and the economy as a whole is undeniable.
4. In order to mitigate against this, Government has taken a number of proactive steps to support businesses and employees alike. These include:-
 - 4.1. the announcement that the Temporary Employee / Employer Relief Scheme will be utilized to ensure that employees who are temporarily laid off as a result of coronavirus have a measure of income protection. This scheme is known as “COVID 19 TERS”;
 - 4.2. amongst other things, COVID 19 TERS allows employers to claim a wage subsidy in order to pay their employees in circumstances where they are financially distressed;
 - 4.3. COVID 19 TERS also provides for UIF illness benefits which will allow employees who are sick and ‘quarantined’ for 14 days to claim UIF illness benefits for that period without the need to obtain a medical certificate;
 - 4.4. the publishing of a COIDA circular permitting certain infected employees to claim temporary disability benefits (i.e. on the basis that they have contracted an occupational disease);
 - 4.5. the granting of a tax subsidy to employees earning less than R6,500.00 per month;

- 4.6. the granting of a delay in paying 20% of PAYE liabilities for the next few months and a reduction of corporate tax payments without penalties over the next six months (for businesses with an annual turnover of less than R50 Million). This has been done in order to ensure that SMME's are able to maintain liquidity;
 - 4.7. potential funding from the Department of Small Business Development for distressed SMME's;
 - 4.8. a separate IDC package for certain vulnerable businesses; and
 - 4.9. exempting commercial banks from certain anti-trust provisions in the Competition Act so that they can work together in respect of debt relief.
5. In relation to these options, Government is still in the process of providing additional details including the quantum of funding that will be allocated as well as how employers can implement the various options (including whether they can do so unilaterally).
 6. This has not stopped a number of commentators making definitive statements regarding what can be done including that employers can implement forced layoffs or compel employees to take their annual leave for the period of the lockdown in the absence of either consultation or agreement. We consider such definitive statements to be premature and potentially fraught with risk.
 7. There has also been rampant speculation about the benefits that are available, whether specific time limits have been imposed to apply for them and whether repayments to government will be required (with interest). There is no factual basis to many of these assertions.
 8. With the above in mind, this follow up article contains a brief note on the mitigation plans put in place by Government to allow businesses and employees to survive during this period including the options available for employers who cannot afford their wage bill while their businesses are shuttered during the lockdown or for a period thereafter.
 9. Given that the details in relation to these options are still being fleshed out, as will appear below, caution must be exercised by employers when implementing any of these options and a consultative and consensus seeking process is always advisable.

'COVID 19 TERS' & the Temporary Lay-Off

10. TERS has historically permitted employers who were facing short-term financial difficulty to utilize a training lay-off scheme (administered by the CCMA) in order to avoid retrenching their staff. This involved the temporary lay-off of employees who were placed on SETA approved training.
11. Subject to approval, the UIF would provide a salary subsidy to those employees during the period of the lay-off. The wage subsidy typically amounted to 75% of the affected employees'

wages subject to a statutory cap of R17242.00. Employers would also remain responsible for providing benefits such as pension / provident fund and medical aid scheme contributions.

12. Critically, TERS required an agreement between employers (or Employers' Organisations) and employees (or Unions) that a training lay-off scheme would be implemented. That agreement would be provided to the CCMA before any wage subsidy was approved. Sufficient proof also had to be provided regarding the financial distress of the business and the implementation of a wage subsidy was subject to an assessment by an adjudication committee and a MOU being concluded with the UIF (in relation to the undertakings to use the money to pay employees).
13. On 17 March 2020 the Minister of Employment and Labour announced that TERS would be utilized as a means of combating the adverse effects of the coronavirus pandemic on employers.
14. This was reiterated by the President on 23 March 2020 when he confirmed that the Government was in consultation on a special TERS dispensation which could be utilized by employers to pay the wages of employees in order to "*avoid retrenchment*".
15. On 26 March 2020 the Minister of Labour Gazetted Regulations governing so-called 'COVID 19 TERS' and on the same date the Department of Labour Published an Easy Aid Guide in respect of how to apply for this benefit and which can be accessed on its [website](#). The Regulations and Easy Guide stipulate as follows: -
 - 15.1. employers that are not financially distressed should keep paying their employees and will not qualify for COVID 19 TERS. It is likely, however, that the UIF will adopt a flexible approach in relation to what financially distressed means and may accept that closed businesses in general are distressed rather than attempting to assess the finances of each applicant (for large employers more scrutiny may be applied);
 - 15.2. COVID 19 TERS is available for employers who have closed their operations subject to the following conditions (as stipulated in the Regulations): -
 - 15.2.1. the closure is directly linked to COVID 19;
 - 15.2.2. the employer is registered with UIF;
 - 15.2.3. the business is suffering financial distress as a result of the closure; and
 - 15.2.4. the employer is not paying its employees.
 - 15.3. the duration of the COVID 19 TERS benefit depends on how long the business is closed. Businesses that are closed only for the period of the National Lock Down can only claim for that period. Businesses that are closed for longer as a result of Coronavirus may be able to claim for as long as three months;
 - 15.4. the salary benefits that can be claimed will be paid in terms of the income replacement rate sliding scale and will be between 38% and 60% of an employee's salary depending on an employee's prior income and subject to a statutory cap of R17,242.00;

- 15.5. COVID 19 TERS will not pay for benefits (medical aid & pension / provident fund contributions) and the employer remains liable to pay these contributions;
 - 15.6. applicant employers will be required to provide a letter of authority (on letterhead) granting permission to a person identified in that letter to apply;
 - 15.7. the last three months' payroll information will have to be provided as proof for the amount claimed together with confirmation of the bank account details to which the benefit will be paid (either the employers bank account details or a bargaining council's);
 - 15.8. to commence an application an email must be sent to Covid19ters@labour.gov.za where an automatic response containing further information will be sent.
16. Critically, employers should not unilaterally implement lay-offs without consulting with their employees. In some industries lay-offs are regulated by Bargaining Council Agreements which must be complied with.
 17. By way of example, the National Bargaining Council for the Clothing Manufacturing Industry in SA is the first Bargaining Council to make use of TERS. It has, through agreement between the employers' associations and SACTWU, secured a UIF wage subsidy for employees during the period of the National Lockdown.
 18. We expect that over the coming days there will be many similar Bargaining Council agreements across a range of industries and employers who fall under the ambit of a Bargaining Council should contact their respective offices in order to determine if such agreements will apply to them.
 19. Employers not covered by Bargaining Council Agreements should also consult with affected employees in relation to the implementation of a lay-off and an application for COVID 19 TERS (this can be done telephonically, by SMS or by video chat).
 20. Where no agreement is reached with employees and the employer does not have the finances to pay salaries, employers may be left with no option but to apply for COVID 19 TERS. It is precisely for this reasons that emergency protections have been put in place (i.e. to avoid a situation where employees are subjected to a unilateral unpaid lay off during the closure).

Can forced Annual Leave be implemented?

21. Section 21(10) of the Basic Conditions of Employment Act states that annual leave may be taken at a time agreed between an employer and an employee or alternatively, if there is no agreement, at a time determined by the employer. There is also case law to indicate that the employer can unilaterally determine when annual leave must be taken.

22. Many commentators, relying on the above, have concluded that employers can oblige employees to take annual leave during the period of the lockdown. In our view, a more detailed assessment is required.
23. Firstly, on 26 March 2020 the Department of Labour issued a directive on COVID 19 and its implications on the BCEA Leave provisions. That Directive states that employees “*may be requested*” by their employers to take annual leave and refers to the following statement by the Chief Director of Labour Relations:-
- “In as much as employers are in their rights to insist that employees take annual leave during the lockdown, as the Department, we encourage employers not to request employees to utilise their annual leave credits for the lockdown, but rather utilise the financial assistance that the department has placed at their disposal through COVID-19 Temporary Employer / Employee Relief Scheme (TERS) in cases where companies cannot afford to pay employees” (emphasis added).*
24. Secondly, annual leave is often regulated in leave policies including policies that make provision for statutory annual leave and additional contractual leave. These leave policies may also place constraints on employers unilaterally determining when leave must be taken. There may also be leave provisions in collective agreements in certain industries.
25. Thirdly, it is not clear that being placed under lock-down will be considered ‘annual leave’ by the Labour Court if / when a test case later emerges on this issue.
26. Lastly, not all employees have annual leave credits (especially given the time of the year) and consequently the use of annual leave may only mitigate a small amount of the wage bill and may therefore not constitute a viable solution. For businesses that apply mandatory leave in December and during annual closures, this may also not be an option.
27. In our view, consultation and consensus should be sought with employees on whether annual leave will be used for the period of the lockdown and, in line with the guidance given by the Department of Labour, it would be preferable to apply for COVID 19 TERS if this is possible.
28. Employers who unilaterally compel employees to take annual leave run the risk of disputes being referred in due course in circumstances where the legal position is not clear.

Short Time

29. For employers who are able to stay open on a reduced basis during the lockdown (because they are an essential service) or who can remain open but on a reduced basis while the coronavirus pandemic continues, an alternative to laying-off or retrenching employees may be the institution of short time (i.e. requiring employees to work for less hours per day).
30. The UIF already provides for benefits when short time is implemented. The UIF benefit payable is the difference between what employer pays for short time and the normal UIF

benefits that would be payable should an employee lose employment (which is also subject to statutory caps).

31. Once again, the issue of short time is regulated by Bargaining Council Agreements in many industries and these provisions must be complied with. Certain employers also have contracts of employment which regulate this issue.
32. As was the case with lay-offs, for employers who are not covered by a collective agreement permitting short time and/or who do not have contractual provisions entitling them to implement short time, agreement should be reached with employees/ Unions in this regard.
33. If agreement is not reached, the alternative for severely financially distressed companies (who cannot afford to pay salaries) is to place employees on COVID 19 TERS.

Unpaid Leave

34. Unpaid leave constitutes a further option for employers to consider, especially in lieu of retrenchment.
35. Again, the focus of the COVID 19 TERS benefits is to avoid this and employers who are able to make use of this scheme should do so without resorting to unpaid leave.
36. The issue of unpaid leave is also regulated by Bargaining Council Agreements in many industries and these provisions must be complied with.

What about sick employees?

37. The Compensation Commissioner has issued a circular for employees who contract coronavirus (where a medical diagnosis confirms this).
38. The circular states that where cases have been confirmed, employees will be treated as temporarily disabled and will be entitled to claim from the Compensation Fund from the date of diagnosis up to thirty days later. This will typically amount to 75% of the employee's monthly earnings.
39. Not every employee who contracts coronavirus will be able to claim and it appears from the circular that, in the absence of a direct connection between work and infection, only employees working in high-risk work environments will be able to claim (i.e. the work being performed must be the likely cause of the infection with coronavirus). This includes healthcare workers, laboratory personnel, morgue workers, medical transport workers, etc.
40. In relation to employees who may be infected with coronavirus (i.e. ill and displaying symptoms) and who are required to go on special leave by their employers in order to 'self-quarantine', the COVID 19 TERS Benefits entitle those employees to claim UIF illness benefits for a fourteen day period.

41. In order to claim such benefits, the UIF has waived the requirement of a medical certificate in favour of a letter from the employer and employee confirming that the employee has been placed on fourteen days special leave to self-quarantine.
42. Employees who are entitled to temporary disability from the Compensation Fund cannot claim UIF illness benefits. Employees who are ill for longer than fourteen days must then obtain a medical certificate to continue claiming UIF illness benefits in the normal course.

Other Options

43. The best option for employers and employees alike remains to implement 'work from home' arrangements where possible. Such arrangements should ideally be dealt with in a Policy that stipulates, amongst other things, the hours of work required, the requisite level of communication with managers, team members, customers, etc. as well as the targets / deliverables that must be met.
44. Obviously, many employers will be unable to implement work from home arrangements due to the nature of their business. This would include retailers, restaurants, entertainment / tourist businesses, service business (electricians, plumbers, etc) and the like. For others, such work from home arrangements may be unsustainable given the economic downturn. Travel agents and estate agents come to mind. They will have to consider the alternative options set out above.
45. Critically, home workers who display the symptoms of the coronavirus are still able to claim the UIF illness benefits set out above. Consequently, they must notify their employer when they are sick so that special leave can be implemented, and employers can reduce their wage bill.
46. In relation to funding, in a statement released by the Ministry of Small Business Development on 19 March 2020 the Department stated that SMME's will be able to claim from a debt relief fund to assist them inter alia with "[paying] labour and other operational costs". We have not been able to access the website referred to in the media statement and it does not appear to be operational yet.
47. The details in relation to the SARS tax subsidy for persons earning less than R6,500.00 per month and the delay in PAYE obligations are also yet to be announced. Certain employers may however apply for funding from the IDC. More details can be found [here](#).
48. We will update this brief once more details are made available by Government and in particular the Department of Labour

Conclusion

49. A consultative and consensus seeking approach should be adopted in relation to employees.

50. Employers should consider the best options available to them and discuss these with their employees. This can be done telephonically, over SMS or video chat. An attempt to reach agreement should be made and, where available, UIF benefits should be applied for.
51. Employers who do not have sufficient funds to satisfy their wage bill may have to place employees on COVID 19 TERS in order to avoid retrenching staff or utilizing unpaid leave.
52. Employers must also consider whether any collective agreements apply and whether they can implement TERS wage subsidies (through bargaining councils) or if they are permitted by existing agreements to implement lay-offs, short time or unpaid leave.
53. Large employers should be engaging with Unions in an attempt to reach agreement in relation to their staff (this may be done in Bargaining Councils). Where any unilateral action is being considered, legal advice must be obtained given the extent of the risk.

Disclaimer

The contents and suggestions contained in this article are for information purposes only and are not for the purpose of providing specific comprehensive legal advice. The situation and regulations remain fluid and you should contact us to obtain advice with respect to any particular issue or problem mentioned herein.

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