

EMPLOYMENT LAW

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Temporary relief for applicants with pending visa and waiver applications

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Applicability of Regulation 69 of the Transitional Regulations to the workplace

With effect from midnight of 4 April 2022, the National State of Disaster ended, and all regulations and directions made in terms of section 27(2) of the Disaster Management Act 57 of 2002 (DMA) were repealed with immediate effect, save for a few transitional provisions which will automatically terminate 30 days after the end of the National State of Disaster (Transitional Regulations). One of the Transitional Regulations, particularly, Regulation 69, pertains to gatherings and the limitations related thereto.

In terms of Regulation 69 (1) and (2), all gatherings are limited as follows:

- where those in attendance are vaccinated or in possession of a negative COVID-19 test no older than 72 hours: the venue may not exceed 50 percent capacity with strict adherence to all health and safety protocols; and
- where those in attendance are unvaccinated or not in possession of a negative COVID-19 test no older than 72 hours: the gathering is restricted to 1000 persons or less for indoor venues and 2000 persons or less for outdoor venues unless the venue is too small to hold the prescribed numbers while observing social distancing of 1 metre, in which case the 50 percent capacity rule will apply.

Furthermore, in terms of Regulation 69(4), gatherings at a workplace are permitted, provided all health and safety protocols are adhered to.

Does the limitation on gatherings set out in Regulations 69 (1) and (2) apply to the workplace? Are employers limited in relation to the number of employees who are permitted to attend to the workplace based on whether employees are vaccinated or in possession of a negative COVID-19 test?

Chapter 1 of the Regulations published on 24 April 2020 defines a gathering as:

"Any assembly, concourse or procession in or on:

any public road, as defined in the National Road Traffic Act, 1996 (Act No. 93 of 1996); or any other building, place, or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, religious, or cultural purpose; but excludes a workplace and a place of residence for those persons ordinarily residing at the residence[.]"

Under this definitional framework, which has since been repealed, a workplace was not included in the definition of a gathering, hence Regulation 69(4) prescribed a specific carve-out for the regulation of gatherings at the workplace for work purposes. However, even under that framework, Regulation 69(4) appears to have applied only to gatherings for work purposes, and any other gatherings in the workplace might have been regulated under different frameworks.

Although the definition of "gathering" was last provided in April 2020, what sets these Transitional Regulations apart from every other set of regulations since 2020 (which kept the previous regulations intact subject only to certain amendments) is that the Transitional Regulations repealed all prior provisions, save for the transitional provisions. Accordingly, the definitions clause fell away once the National State of Disaster ended. Consequently, on a reading of the Transitional Regulations as they now

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stand, the ordinary meaning of the term “gathering” will be preferred over the more technical meaning which no longer operates.

In addition, section 12(2)(b) of the Interpretation Act 33 of 1957 provides that where a law repeals any other law, unless the contrary intention appears, the repeal shall not affect the previous operation of any law so repealed or anything unduly done or suffered under the repealed law. Although this provision generally applies to retroactivity (see *Hewitt v S* [2016] 3 All SA 784 (GJ) and *Malcolm v Premier, Western Cape Government* N.O. (207/2013) [2014] ZASCA 9), an argument could be made that “previous operation” includes the way a statute applied, including its scope and definition. This could mean that absent a specific intention to change the scope or definition in the repealing statute, the way in which the statute or provisions thereof previously operated remains in force,

subject to any new specifications. Of course, this argument also suffers from the possibility that the repeal of the definitions clause without any replacement in this case essentially indicated intention to dispense therewith, such that all remaining provisions will henceforth be granted their ordinary meaning.

In essence, the Transitional Regulations are still clear that, at a minimum, gatherings in the workplace for work purposes are allowed, subject to strict adherence to all health protocols and social distancing measures. But since the bar on the definition of gatherings no longer exists, there is no reason why the same provisions in Regulations 69(1) and (2) do not also apply to the workplace. Indeed, the objective of those provisions is rooted on a health and safety rationale, and it would make no sense, fundamentally, to exclude workplaces therefrom.

FIONA LEPPAN AND LISO ZENANI

2022 RESULTS

CHAMBERS GLOBAL 2014 - 2022
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Aadil Patel ranked by
CHAMBERS GLOBAL 2015 - 2022
in Band 2: employment.

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CHAMBERS GLOBAL 2018 - 2022
in Band 2: employment.

Imraan Mahomed ranked by
CHAMBERS GLOBAL 2021 - 2022
in Band 2: employment.

Hugo Pienaar ranked by
CHAMBERS GLOBAL 2014 - 2022
in Band 2: employment.

Gillian Lumb ranked by
CHAMBERS GLOBAL 2020 - 2022
in Band 3: employment.



Cliffe Dekker Hofmeyr

Temporary relief for applicants with pending visa and waiver applications

Since the beginning of the COVID-19 pandemic, the Department of Home Affairs has experienced a severe backlog in the processing of visa and waiver applications. This has left thousands of foreign nationals with uncertainty regarding their future in South Africa and has forced many of them to leave the country to avoid being declared undesirable. In order to address the excessive backlog, the Minister of Home Affairs approved the introduction of certain temporary measures. These measures were implemented by the Acting Director-General in a circular dated 1 April 2022, with immediate effect.

The circular applies to foreign nationals who have been legally admitted into South Africa and who are currently waiting for the outcome of their visa or waiver applications as follows:

- Applicants who have pending waiver applications are granted a blanket extension until 30 June 2022 for their applications to be processed, and in order to collect the outcome of their applications and apply for their appropriate visas. On the other hand, if applicants elect to abandon their waiver applications and leave South Africa, they will be allowed to do so on or before 30 June 2022 without the risk of being declared undesirable.

- Similar to the above, applicants whose visa applications are still pending are granted a blanket extension of their current visa status until 30 June 2022. If these applicants elect to abandon their pending applications, they are allowed to leave South Africa by this date without being declared undesirable. During this time, however, applicants are prohibited from engaging in any activity, other than the activities specifically provided for in their current visa conditions.

In addition to the above, the circular allows applicants with pending long-term visa applications to travel during the upcoming April festive season as follows:

- Applicants who originate from countries that are exempt from port of entry visa requirements may travel by presenting their receipt from the Visa Facilitation Services (VFS) when they return to the port of entry for admission back into South Africa, and to collect their visa outcomes.

- Applicants who originate from countries that are visa restricted will need to obtain a port of entry visa and present their receipt from the VFS in order to re-enter South Africa.

While the above measures are only applicable until 30 June 2022, they will surely be welcomed by many foreign nationals who have pending visa and waiver applications. It does, however, remain to be seen whether these measures will be extended for a further period. In the interim, foreign nationals who choose to travel over this period must ensure that they do so with their respective visa and waiver application receipts in order to avoid being refused entry back into South Africa.

**MICHAEL YEATES, TARYN YORK AND
MAPASEKA NKETU**

Managing mandatory vaccinations in the workplace in terms of the new code

On 15 March 2022, the Department of Employment and Labour (Department) published the Code of Good Practice: Managing exposure to SARS-COV-2 in the Workplace, 2022 (Code) which came into effect on 5 April 2022, following the end of the national state of disaster. The Code introduces new rights and obligations for employers and employees in relation to mandatory vaccinations. This infographic is a summary of same.

1

EMPLOYER OBLIGATIONS (SECTION 12 (1) AND (2))



Every employer must:



notify employees of its intention to implement mandatory vaccinations, to whom it will apply and the deadline for vaccination;



counsel employees on the nature, benefits, contra-indications, risks and serious side effects associated with vaccines;



permit consultation, at the employee's request, with a health and safety representative/worker representative/ trade union official;



provide administrative support to employees to register and access their vaccination certificate in the EVDS portal; and



provide employees paid time off to be vaccination and provide employees transport to and from the nearest vaccination site (presumably from the workplace).

2

ADVERSE VACCINE EVENT (SECTION 12(3))



Where an employee suffers an adverse vaccine event that renders them unable to work, an employer must:



On receipt of a medical certificate, grant the employee paid time off if they are no longer entitled to sick leave in terms of the BCEA or a collective agreement; or



Subject to the Scheme, make application in terms of COIDA.



Managing mandatory vaccinations in the workplace in terms of the new code

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3


REFUSAL TO BE VACCINATED (SECTIONS 12(4)-(6))




General refusal to be vaccinated (section 12(4))


Refusal to be vaccinated


 counsel employee


 on request allow consultation with member of the health and safety committee/ worker representative or trade union official

 take steps to reasonably accommodate employee.

Refusal to be vaccinated for contra-indications for vaccines (sections 12 (5) and (6))

 employee produces a medical certificate attesting to serious adverse reactions to vaccines, employer may send the employee for medical testing at their expense

 If the employer accepts the medical certificate or the employee is referred for medical testing and its confirmed that the employee has contra-indications for vaccination

 The employer **MUST** accommodate the employee in a position where they are not required to be vaccinated.

4

VACCINE STATUS AND VACCINATION CERTIFICATE



In terms of the Code, an employer may require employees to disclose their vaccination status and produce a copy of their vaccination certificate.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

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