

AN EMPLOYER'S GUIDE TO THE SECOND "COVID-19" HOLIDAY SEASON AND THE NEW WORLD OF WORK IN 2022



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An employer's guide to the second "COVID-19" holiday season and the new world of work in 2022

Following a year of grappling with the COVID-19 pandemic, the new world of work, and COVID-19 vaccinations, employers have new considerations to face during the festive season, particularly as the South African COVID-19 Vaccination Programme begins to lag and a fourth wave is predicted. The purpose of this guide is to assist employers in navigating potential employee related challenges in the upcoming "COVID-19" holiday season and in the new world of work commencing in 2022.

1. RETURN TO WORK 2022, MANDATORY VACCINATIONS, REMOTE WORK, PERFORMANCE AND PRODUCTIVITY

What are some of the flexible working models an employer can introduce in 2022?



Online work is a fast-growing trend. The digital revolution is driving new forms of employment facilitated by the various online platforms available. Remote and hybrid working arrangements allow employees to work from home and attend at the traditional workplace/office intermittently.

Typical employment is full-time employment for an indefinite period while atypical working models include temporary placements, fixed-term contracts, and variable hour contracts (which are a special form of part-time employment).

What are some of the benefits of atypical employment?



These working arrangements afford both employers and employees greater flexibility. They can attract highly skilled employees who favour the flexibility that they offer. They also allow employers to contain labour costs and tend to provide a larger pool of candidates with the opportunity to gain work experience and develop their skills.

What are possible negative consequences associated with remote working and other atypical employment relationships?



Possible negative consequences include lack of job security and the potential for excessive or improper use of atypical forms of employment. These negative consequences can impact on equality in the workplace as well as productivity and growth.

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1. RETURN TO WORK 2022...continued

Is employee consent required to move to a hybrid/remote working model?



Employers looking to implement a hybrid/remote working model should consider whether their employees' place of work and the working arrangements are determined through workplace practice, or whether they are incorporated as terms and conditions of employment in employees' contracts of employment.

If the employees' working arrangements including place of work are set out in the contract of employment, this may require that any change to the working arrangements be effected with the employees' consent. Failure to secure consent could result in a unilateral change to the employees' terms and conditions of employment. In addition, if the employer subsequently dismisses an employee for failing to adhere to the new hybrid/remote working model, this may expose the employer to a claim for an automatically unfair dismissal.

Where an employer chooses to implement a remote/hybrid working model what are the employer's obligations in respect of ergonomic assessments?



Employers or their health and safety committees must conduct ergonomic risk assessments and implement a training programme to educate employees about the risks and hazards present in those workplaces. Since it is not feasible to assess every employee's home, employers may identify certain generic hazards and risks that employees may encounter. Employers are required to comply with the Ergonomic Regulations published in December 2019 to the extent that it is reasonably practical.

Can an employer implement a mandatory vaccination policy in 2022 notwithstanding the missed 21 day deadline?



The 21 day period within which an employer was required to conduct a risk assessment expired on 2 July 2021. However, there is no prohibition in the 11 June 2021 Directions to an employer implementing a mandatory vaccination policy beyond this date.

[Click here](#) for more guidance on mandatory COVID-19 vaccination policies on our CDH Vaccination Resource Hub.

What does an employer do when employees refuse to return to the office in 2022 and on what basis can an employee lawfully refuse to return?



Employers that have conducted a risk assessment of the workplace and implemented appropriate measures to ensure the health and safety of employees such as social distancing, sanitizing, vaccination policies and ensuring that employees wear personal protective equipment will be entitled to call on employees to return to the office.

The contract of employment may stipulate an employee's place of work. If an employee unreasonably refuses to return to the stipulated place of work, then the employee may be in breach of the contract of employment and the employer may institute disciplinary action against the employee.

An employee who fails to adhere to a reasonable and lawful instruction from an employer to return to the contractually agreed workplace may be guilty of insubordination which is a form of misconduct and may result in dismissal.


However, employees have the right to refuse to return to the workplace if they have a legitimate and objective reason to believe that the workplace poses a threat to their health and safety.

Employers should assess the reasonableness of an employee's concern and eliminate the risk, if any. Once the health and safety threat has been remedied a continued refusal may constitute insubordination.

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1. RETURN TO WORK 2022...continued

How do employers engage with employees who are working from home during the holiday season and beyond? How does an employer manage productivity and performance of employees working from home?



There are important considerations pertaining to productivity and performance management that employers and HR need to take into account as remote working and hybrid working arrangements continue into 2022.

Employers may implement, inter alia, the following measures to monitor and ensure productivity:

- daily check-ins;
- daily collaboration sessions during which employees share ideas in order to maintain motivation;
- clearly defined daily/weekly deliverables;
- introduction of efficient technology and productivity tools;
- time sheets; and
- assisting employees with developing strategies to work effectively from home.

An employer may also introduce various practical measures to engender a work culture, albeit whilst at home, such as an online meeting dress code policy, customised backgrounds for meetings, requesting that employees attend meetings, insofar as possible, in a quiet area of their home so as to ensure that a level of professionalism is maintained.

Employers should review the conduct and performance of employees who are currently working from home and identify any gaps in productivity, performance and monitoring and evaluation. Based on this assessment, employers should review their work from home policies and remote work protocols to assess the ways in which they can make the remote work environment more effective and efficient.


What are the steps employers need to put in place now in order to implement a mandatory vaccination policy come January 2022?



Employers may:

- Identify the employees who fall within the identified category/categories of employees that must be vaccinated, and inform them of the measures that will be implemented with regards to the mandatory vaccination policy;
- Provide electronic support to assist employees to register on the EVDS Registration Portal for COVID-19;
- Inform employees that they will be entitled to paid time off to be vaccinated, provided an employee shows proof of vaccination;
- Allow employees to submit objections/application for exemption to being vaccinated based on Constitutional, religious or medical grounds;
- Provide employees with information on the nature and benefits of the COVID-19 vaccines; and
- Provide employees with information on the risks of any serious side effects such as allergic reactions.

How do employer's address mental health in the workplace?



Employers should take proactive steps to limit the implications of mental health challenges faced by employees. Possible measures to implement include:

- Educate employees around mental health and remove the stigma associated with mental health concerns in the workplace;
- Foster team interaction and activities to raise awareness around mental health;
- Encourage employees to speak to relevant HR personnel if they are experiencing mental health challenges;
- Where there are no internal personnel to discuss mental health concerns, employers may source free counselling provided by the government and NGOs, and direct employees to these free resources. Employers should ensure that employees understand that such resources are not affiliated with the employer.
- In circumstances where employees are struggling to cope with negative mental health concerns, employers may consider allowing employees unpaid leave as a measure of last resort.

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2. LEAVE CONSIDERATIONS

Can employees be forced to take their annual leave over December?

An employer is entitled to stipulate that annual leave must be taken to coincide with company closures over the December period. Where employees have exhausted their annual leave during the course of the year, the December closure or "shut down" period may be treated as unpaid leave.



Can an employer cancel the traditional December leave "shut down"?

This is dependent on company policy and any relevant contractual terms. Dependent on the relevant facts this may require the employees' agreement. Also, employers should have regard to any agreements relating to December "shut down" which may have been put in place in 2020 when the lockdown was first implemented and assess whether those agreements extend to 2021.



Is an employer obliged to agree to cancel an employee's annual leave on the basis that their pre-booked holiday has been cancelled due to COVID-19?

No. Unless specifically stated in terms of a contract of employment, HR policy or collective agreement, an employer is not obliged to cancel an employee's annual leave owing to the cancellation of their pre-booked holiday, whether related to COVID-19 or otherwise.



How does an employer manage company assets over the holiday season, particularly company vehicles and IT equipment?

Any misuse of company property over the festive season is misconduct in the ordinary course and may be dealt with in terms of an employer's disciplinary code and procedure. Employers may put measures in place to ensure that company vehicles and the like are not being misused by e.g. tracking the kilometres on the vehicle.



How does an employer manage potential abuse of sick leave over the holiday season?

Employers should ensure that sick leave is closely monitored and where applicable, that employees produce the requisite medical certificates from registered medical practitioners. Employers may also wish to send out a communication to employees ahead of the holiday season reminding employees that abuse of sick leave is a disciplinary offence and will be dealt with in terms of the employers' disciplinary code and procedure.

The production of fraudulent medical certificates is also a criminal offence. There is authority for the prosecution of employees who have relied upon fraudulent medical certificates.



Where theft of a company asset occurs, employees should be aware of their reporting obligations/protocols so that the employer is compliant with its own reporting obligation/protocol in terms of its insurance policy.

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2. LEAVE CONSIDERATIONS...continued

Is an employee entitled to unpaid leave for holiday purposes where they have exhausted their annual leave due to COVID-19 and national lockdowns?



No. There are no provisions contained in the Basic Conditions of Employment Act 75 of 1997 (BCEA) which entitle an employee to unpaid leave. Unpaid leave is only referred to in the BCEA with reference to what an employer is entitled to do when an employee's sick leave or annual leave has been exhausted. Unpaid leave is generally a measure of last resort and is only to be used in exceptional circumstances. An employee is not entitled to demand to be placed on unpaid leave during the holiday season, albeit that the employee may have exhausted their annual leave owing to reasons related to COVID-19.

Notwithstanding the above and having regard to the mental health implications and the difficulties faced by all employees arising from the pandemic, it is advisable that where an employee wishes to take unpaid leave that an employer seriously consider this. A period of rest is important. We have over the year discussed the issue of mental health. Employers, employees and trade unions should think out the box to meet operational requirements to ensure that the workforce which returns in 2022 is able to meet the challenges of the continued pandemic and difficult global economy.

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3. COVID-19, QUARANTINE AND THE IMPACT ON LEAVE

Is an employer obliged to pay employees who are self-quarantining?



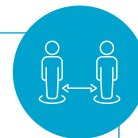
Where an employee is able to work from home while quarantining, the employee may do so and will therefore be entitled to their full salary. In cases where an employee is unable to work from home, the employee may make use of their annual leave for the quarantine period. Where an employee has exhausted their appropriate leave, the principle of "no work, no pay" will apply, and the employee will be placed on unpaid leave.

Is an employer entitled to discipline an employee for failure to adhere to health and safety protocols during the holiday season, where the conduct of the employee is not related to or in the course and scope of their employment?



Unless the employer can show that the conduct of the employee has damaged the employment relationship in some way, the employer is not entitled to discipline the employee for their conduct outside of the workplace and unrelated to their work. A balance must be struck between an employer maintaining a safe working environment post the holiday season and an invasion of an employee's privacy. Employers can only encourage employees to adhere to government protocols outside of the workplace. This should be strongly reiterated in farewell or year-end company communications.

What measures can an employer implement to mitigate the risk of an outbreak of COVID-19 in the workplace once employees return from the holiday period?




An employer may implement the following measures:


- send a communication to all employees ahead of the festive season encouraging them to adhere to all health and safety protocols outside the working environment for the duration of the holiday season;
- remind employees throughout the holiday season of the mandatory health and safety measures as required by government;
- encourage employees who display any symptoms of COVID-19 to remain at home and, in serious cases, to submit themselves for testing;
- maintain strict screening protocols upon entrance to the workplace in 2022; and
- ensure that all health and safety measures are strictly adhered to, as many employees may be asymptomatic.

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4. MISCONDUCT AND SOCIAL MEDIA

 Can an employee be dismissed for being found guilty of drunken driving, even if the employee was not on duty when the incident of drunken driving took place?

Yes, where the employee's contract of employment is terminable on the basis of the employee having committed a criminal offence, or where the employer can show that the unlawful conduct of the employee has the potential to negatively impact the employment relationship.

 Is incarceration a ground for dismissal on the basis of incapacity?


While the Code of Good Conduct: Dismissal refers to incapacity as being based on ill health or injury or poor work performance, the ruling in *Samancor Tubatse Ferrochrome v MEIBC* (Maloma & Stemmett NO) [2010] JOL 257 48 (LAC) held that incapacity can take other forms including imprisonment. The question is whether because of the supervening impossibility of performance a breach in the employment relationship has occurred.

 May an employer dismiss an employee for social media posts which have the potential to bring the employer's reputation into disrepute?

This will depend on the employer's social media policy and whether an employee can be said to have posted social media content that is in contravention with the employer's policy and/or has the potential to bring the good name and reputation of the employer into disrepute. Employers are encouraged to review and update their social media policies to align with current best practice.

 Can an employee be dismissed for the use of cannabis at home during working hours?

While the Constitutional Court has decriminalised the private use of cannabis, this does not give employees licence to work under the influence of cannabis or to use cannabis during working hours. Like with alcohol, where consumption of cannabis impairs an employee's ability to work to the standard, care and skill required by the employer, the employer is entitled to take disciplinary action against the employee.

 Can an employee be dismissed for being intoxicated during working hours where the employee is working from home and the employer is unable to perform a breathalyzer test?

Yes. An employer's policies must clearly state that there is a zero-tolerance drinking policy during working hours, and an employee may be dismissed for being intoxicated, albeit that the employee is working from home. Employers need not have a positive breathalyser test. Intoxication may be determined on a balance of probabilities taking into account common indicators of intoxication or by way of the observation of conduct such as slurred speech, incoherence and the like.

 With the introduction of the Protection of Personal Information Act 4 of 2013 (POPI), is an employer entitled to use an employee's social media content as a ground for dismissal?

This will depend on the employer's social media policy. Employers should review their social media policy ahead of the festive season and ensure that the necessary POPI consents have been obtained.

In early 2022, employers should measure their POPI compliance against the benchmarks set in 2021.

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5. STAFF YEAR END PARTIES



Are employers permitted to host staff year end functions?

While it may not be recommended, an employer is legally permitted to host a staff year end party provided that the regulations pertaining to gatherings are adhered to. The current regulations pertaining to gatherings are as follows:

- all persons in attendance must wear a face mask, maintain social distancing of 1,5 meters and adhere to all health and safety protocols; and
- the number of persons in any venue may not exceed 50% of the venue capacity with persons adhering to 1,5meters social distancing. A maximum limit of 750 persons are allowed in relation to indoor gatherings or faith-based gatherings and a maximum number of 2000 persons are allowed in relation to outdoor gatherings.

Employers may also consider hosting staff year end functions or team building events virtually by way of webinars.

DISCLAIMER:

The end of the national state of disaster was announced with effect from midnight on 4 April 2022 and accordingly all regulations and direction published pursuant to section 27(2) of the Disaster Management Act 57 of 2002 have been repealed save for limited transitional regulations. Please note that any reference to regulations or directions published pursuant to the national state of disaster no longer apply and this guideline must be read in the context of the national state of disaster and the relevant operational legislation at the time.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2022 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2022* recommended us in Tier 1 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of the Employment Law team, and the Joint Sector Head of the Government & State-Owned Entities sector. *Chambers Global 2015–2022* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2022* recommended Aadil as a leading individual for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2022 recommended **Anli Bezuidenhout** for employment.

Jose Jorge is the Head of the Consumer Goods, Services & Retail sector, and a director in our Employment Law practice. *The Legal 500 EMEA 2020–2022* recommended Jose for employment.

Fiona Leppan is the Joint Head of the Mining & Minerals sector, and a director in our Employment Law practice. *Chambers Global 2018–2022* ranked her in Band 2 for employment. *The Legal 500 EMEA 2022* recommend Fiona for mining. *The Legal 500 EMEA 2019–2022* recommended her as a leading individual for employment and recommended her from 2012–2018.

Chambers Global 2020–2022 ranked **Gillian Lumb** in Band 3 for employment. *The Legal 500 EMEA 2020–2022* recommended her for employment.

Chambers Global 2021–2022 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2022* recommended him for employment.

The Legal 500 EMEA 2022 recommended **Desmond Odhiambo** for dispute resolution.

Hugo Pienaar is the Head of the Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2022* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2022* recommended him for employment.

The Legal 500 EMEA 2022 recommended **Njeri Wagacha** for employment.

Chambers Global 2020–2021 ranked **Michael Yeates** as an up and coming employment lawyer. *The Legal 500 EMEA 2020* recommended him for employment.



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.

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