



# AN EMPLOYER'S GUIDE TO THE "COVID-19" HOLIDAY SEASON



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The COVID-19 pandemic has created additional complexity for employer considerations during the festive season, particularly at the cusp of what seems to be the dreaded "second wave". Many employees have exhausted their annual leave due to COVID-19 related company closures or in instances where their sick leave entitlement was exhausted. Are employees entitled to take unpaid leave for holiday purposes where their annual leave is exhausted? Does an employer have to pay an employee who is in quarantine after returning from a "hotspot" area over the festive season? The purpose of this guide is to assist you in navigating potential employee related challenges in the upcoming "COVID-19" holiday season and in the new work of work commencing in 2021.

## 1. 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" to make up for lost days during the national lockdown?

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This is dependant on company policy and any contractual terms to this effect. The prospect of doing so is possible but may be subject to agreement. Also, employers should have regard to any agreements put in place earlier in 2020 when the lock down was first implemented in respect of the December "shut down".

### 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 a 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.

# An employer's guide to the "COVID-19" holiday season

## 1. 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.

However, having regard to the difficulties presented to all employees in 2020, it is advisable that where an employee wishes to take unpaid leave that an employer seriously consider this especially as 2021 is uncertain. A period of rest is important. We have over the year discussed the issue of mental health. There were novel approaches to the utilisation of leave designed in 2020, such as a 'leave banks' (which were shared by employees by agreement). Employers, employees and unions should think out the box to meet operational requirements to ensure that the workforce which returns in 2021 is able to meet the challenges of the continued pandemic and difficult global economy.

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



Employers must 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 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.

### 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 tracking the kilometres on the vehicle, etc.

Where there is theft of a company asset, 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.

# An employer's guide to the "COVID-19" holiday season

## 2. COVID-19, QUARANTINE AND THE IMPACT ON LEAVE

### Is an employer obliged to pay employees who are self-quarantining after returning from a "hotspot" area over the holiday season?

"Hotspots" need to be clearly identified and communicated by employers to employees. Employers may refer to the website of the National Institute for Communicable Diseases in this regard.

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 annual leave, the principle of "no work, no pay" will apply, and the employee will be placed on unpaid leave. As the self-quarantine period would be unconnected to workplace related exposure, the Compensation Funds' COVID-19 claims process would not find application.

Employers must alert employees to the fact they will be required to self-quarantine upon return from a "hotspot" area and that they will need to make use of their annual leave or unpaid leave for this period, in the event that they are unable to work from home. This must be communicated to employees ahead of an employee going on leave.

Owing to the exceptional circumstances created by the COVID-19 pandemic and even the potential for loss of life should an employee become infected, it can be argued that a mandatory self-quarantine period upon returning from a "hotspot" area does not amount to unfair discrimination.

Upon return from leave, all employees should be required to provide a signed declaration confirming that they have not travelled to a "hotspot" over their period of 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 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. 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 communication.



### 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 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;
- require all employees who will be visiting a "hotspot" area over the festive period to disclose same to the human resources department or the COVID-19 compliance officer ahead of their travel;
- ensure that all employees returning from holidays in areas identified as "hotspots" observe the mandatory 10-day quarantine period;
- 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 2021; and
- ensure that all health and safety measures are strictly adhered to, as many employees may be asymptomatic.



# An employer's guide to the "COVID-19" holiday season

## 3. 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.



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 reputation of the employer into disrepute. Employers are encouraged to review and update their social media policies to align with current best practice.



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 must review their social media policy ahead of the festive season and ensure that the necessary POPI consents have been obtained.
- In early 2021, employers should measure their POPI compliance to the benchmarks set in 2020.



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.



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.

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## 4. 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 1.5m social distancing. A maximum limit of 250 persons are allowed in relation to indoor gatherings or faith-based gatherings and a maximum number of 500 persons is allowed in relation to outdoor gatherings.

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



## 5. RETURN TO WORK, REMOTE WORK, PERFORMANCE AND PRODUCTIVITY

### How do employers engage 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 HR will need to take into account as remote working will continue into 2021.

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

- daily check-in's;
- daily collaboration sessions where employees share ideas in order to keep employees motivated;
- clear daily/weekly deliverables;
- provision of efficient technology and productivity tools;
- time sheets; and
- assisting employees with developing strategies to work effectively from home.

An employers may also enforce some 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 some level of professionalism is maintained.

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



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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.

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