

18 MAY 2020

EMPLOYMENT ALERT

IN THIS ISSUE

Clearing up the confusion: Setting off COVID-19 TERS benefits and the limits of employer liability in relation to employees working from home

The outbreak of the COVID-19 pandemic and the unprecedented changes to working conditions have raised interesting and sometimes novel questions about the duty of employers and the entitlements of employees in a world of work that has changed dramatically.

During lockdown, 'E' is for 'Entry' and sometimes 'Exit' from the Republic of South Africa

On 23 April 2020, President Ramaphosa introduced the phasing in of economic activity according to levels. He stated that from 1 May 2020 the Republic will be lowered from level 5 to level 4. When the country entered level 4 of the lockdown, the borders remained closed to international travel, except for the repatriation of foreign nationals and South Africans.

Clearing up the confusion: Setting off COVID-19 TERS benefits and the limits of employer liability in relation to employees working from home

There are two main issues. Firstly, whether an employer may set off the payment of annual leave against an employee's TERS COVID-19 benefit, and secondly, the health and safety obligations of employers in relation to employees who are working from home.

The outbreak of the COVID-19 pandemic and the unprecedented changes to working conditions have raised interesting and sometimes novel questions about the duty of employers and the entitlements of employees in a world of work that has changed dramatically. Recently, there have been various discussions in relation to an employee's entitlement to Temporary Employment Relief Scheme (TERS) benefits and the duty of employers to ensure the health and safety of their employees, particularly those who are now working from home.

There are two main issues. Firstly, whether an employer may set off the payment of annual leave against an employee's TERS COVID-19 benefit, and secondly, the health and safety obligations of employers in relation to employees who are working from home.

TERS COVID-19 relief and employees who have been directed to take annual leave

The TERS COVID-19 directive makes provision for an employer to claim a TERS COVID-19 benefit on behalf of qualifying employees. The purpose of the TERS COVID-19 benefit is to provide relief to employees who have suffered or will suffer a loss of income due to the closure or partial closure of their employers' operations as a direct consequence of COVID-19.

In terms of paragraph 5(4) of the amended TERS directive, gazetted on 4 May 2020 (Amended Directive), an employer who has directed an employee to take annual leave during the period of the lockdown in accordance with section 22(1)(b) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), may set off any amount received from the UIF in respect of that employee's TERS COVID-19 benefit, against the amount paid to the employee in terms of annual leave. Such set off is only permissible provided that the employee is credited with the proportionate entitlement to paid annual leave in the future.

It is assumed that the Amended Directive was intended to refer to section 20(10)(b) of the BCEA, which reads as follows: *"Annual leave must be taken, if there is no agreement in terms of paragraph (a), at a time determined by the employer in accordance with this section"* (Our emphasis)

Accordingly, in terms of the Amended Directive, employers who have directed employees to take annual leave, are entitled to set off the annual leave payments made to employees against the TERS COVID-19 benefits received from the UIF, provided that the proportionate annual leave of the employees is credited to the employees' future leave entitlement.

Clearing up the confusion: Setting off COVID-19 TERS benefits and the limits of employer liability in relation to employees working from home

...continued

The OHS Act places a positive duty on employers to provide and maintain, as far as reasonably possible, a safe working environment that poses no health and safety risks to employees.

The OSH Act and the home as a "workplace"

The OHS Act places a positive duty on employers to provide and maintain, as far as reasonably possible, a safe working environment that poses no health and safety risks to employees.

The current lockdown has necessitated that many employees work from home. The home has since become the premises from which many employees perform work within the course and scope of their employment. The questions then arise as to whether employers are bound by the provisions of the OHS Act in relation to their employees' working environments at home? What liability, if any, will an employer incur as a result of unsafe working conditions at an employee's home? What, if at all, is the duty of an employer to ensure that an employee does not contract COVID-19 from a workplace which is also their home?

As a starting point, it is important to consider the definition of 'workplace' as defined in the OHS Act. 'Workplace' is defined in section 1 of the Act, as *"any premises or place where a person performs work in the course of his employment."* Given the ambit of this definition, an employee's home working environment is included in the definition of workplace for purposes of the OHS Act.

The duties of an employer in terms of the OHS Act are contained in section 8 and include inter alia the duty to, insofar as is reasonably practically possible, eliminate or mitigate any hazard or potential hazard to the safety of employees. In addition, an employer is also tasked with the duty to enforce such measures as may be necessary in the interests of health and safety in the workplace.

The duties contained in section 8 therefore require that the employer has a measure of control over the workplace environment in order to enforce and maintain the required standards of health and safety. In the home working environment, the employer does not have the control over the premises to put measures in place to ensure that health and safety standards are met, neither does the employer have the control to enforce such measures. It is unreasonable for instance to require of the employer to put in place and enforce measures to control and screen visitors to the home, most likely occupied by more persons than just the employee.

An attempt by employers to dictate and enforce certain health and safety standards in an employee's home, would arguably constitute an invasion of an employee's privacy in the absence of specific statutory powers to do so and a task that in any event is not reasonably practical for the employer to enforce. To place the duty

Clearing up the confusion: Setting off COVID-19 TERS benefits and the limits of employer liability in relation to employees working from home

...continued

The OHS Act presumably envisages that the employer must eliminate or mitigate any hazard or potential hazard to the safety of employees that may arise from the working environment created and provided by the employer, not that of the employee.

on an employer to enforce health and safety standards in an employee's home environment, would also then place a duty on the employer to maintain the health and safety standards of more than just those in their employ.

The OHS Act presumably envisages that the employer must eliminate or mitigate any hazard or potential hazard to the safety of employees that may arise from the working environment created and provided by the employer, not that of the employee.

The employer's duty to ensure a healthy and safe working environment accordingly would not extend to an employee's private residence when that employee is working from home during lockdown. As a result, an employer would not be liable for any illness that an employee contracts in their home environment while performing work in the scope of their employment, including contracting COVID-19.

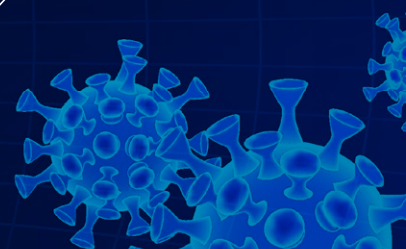
The position is, however, different in relation to any equipment that the employer supplies to the employee to perform work in the course and scope of their employment. The employer must ensure that the equipment provided to employees is safe and complies with any regulations that may apply.

As we continue to navigate these uncharted territories, it is the principles of reasonability and justifiability that will carve out the way forward. The duties and obligations placed on employers during this time cannot be unreasonably impractical, nor can they unjustifiably infringe on the rights of employees to privacy even if the workplace is increasingly also the home.

CDH Employment Department

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



During lockdown, 'E' is for 'Entry' and sometimes 'Exit' from the Republic of South Africa

Measures have been established in an effort to accommodate repatriation of foreign nationals and South Africans during level 4 of the national lockdown.

On 23 April 2020, President Ramaphosa introduced the phasing in of economic activity according to levels. He stated that from 1 May 2020 the Republic will be lowered from level 5 to level 4. When the country entered level 4 of the lockdown, the borders remained closed to international travel, except for the repatriation of foreign nationals and South Africans.

The Ministry of Home Affairs has since then acted accordingly. More specifically, measures have been established in an effort to accommodate repatriation of foreign nationals and South Africans during level 4 of the national lockdown.

Entry into or exit from Republic for emergency medical attention for life threatening condition

A person who wishes to enter or exit the Republic for emergency medical attention for a life-threatening condition must apply to an immigration officer at a port of entry, which immigration officer must inform the Minister of Home Affairs and obtain approval. An application must be supported by documentary proof of the applicant's life threatening condition and a copy of the applicant's valid passport.

In a case where a person requires assistance with physical movement or care, the person providing assistance must be screened and, where applicable, be subjected to mandatory quarantine.

Entry by South African citizens or permanent residents and exit by foreigners to be repatriated to countries of nationality or permanent residence

South African citizens or permanent residents who wish to enter the Republic during lockdown must, prior to the intended entry into the Republic, apply 72 hours in advance to the South African Mission in the country in which he or she is, which Mission must inform the Minister of Home Affairs of the application and obtain approval. The application must be supported by the applicant's passport or ID copy, permanent residence permit and details regarding the travel itinerary in the last two months. South African citizens and permanent residents who are permitted to enter the Republic will be subjected to mandatory quarantine.

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

During lockdown, 'E' is for 'Entry' and sometimes 'Exit' from the Republic of South Africa...*continued*

Foreign nationals who wish to be repatriated to their country of nationality or permanent residence during lockdown must apply to the relevant diplomatic or consular mission in the Republic 72 hours prior to the intended date of departure.

Foreign nationals who wish to be repatriated to their country of nationality or permanent residence during lockdown must apply to the relevant diplomatic or consular mission in the Republic 72 hours prior to the intended date of departure. The diplomatic or consular must notify the Minister of Home Affairs, or a person designated by him or her in writing, of the application and obtain prior approval for the intended exit. The application must be supported by a copy of the applicant's valid passport, a copy of the applicant's temporary residence visa or permanent residence permit and proof of the applicant's means of travel.

Services to be rendered by Department of Home Affairs during level 4 lockdown

The following services will be rendered:

- Re-issue of birth and death certificates;
- Issuance of temporary identity certificates;
- Registration of deaths;
- Registration of birth, excluding late registration of birth;
- Collection of identity cards or documents; and
- Application for, and collection of, passports for persons engaged in the delivery of essential goods across the borders of the Republic and those travelling outside of the Republic for receiving medical services.

Michael Yeates and Mapaseka Nketu

STOP
SEXUAL HARASSMENT

E-learning Offering

Our Employment practice recently launched an e-learning module:
A better place to work

The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

CLICK HERE FOR MORE INFORMATION 

EMPLOYMENT

CASE LAW UPDATE 2019

CLICK HERE
to access CDH's
Employment Law
booklet to assist
you in navigating
the employment
relationship during the
current economic
uncertainty.



CHAMBERS GLOBAL 2014 - 2020 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2020 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2020 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.



OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Bheki Nhlapho
Senior Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com



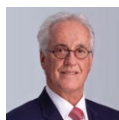
Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Riola Kok
Consultant
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2020 8960/MAY

