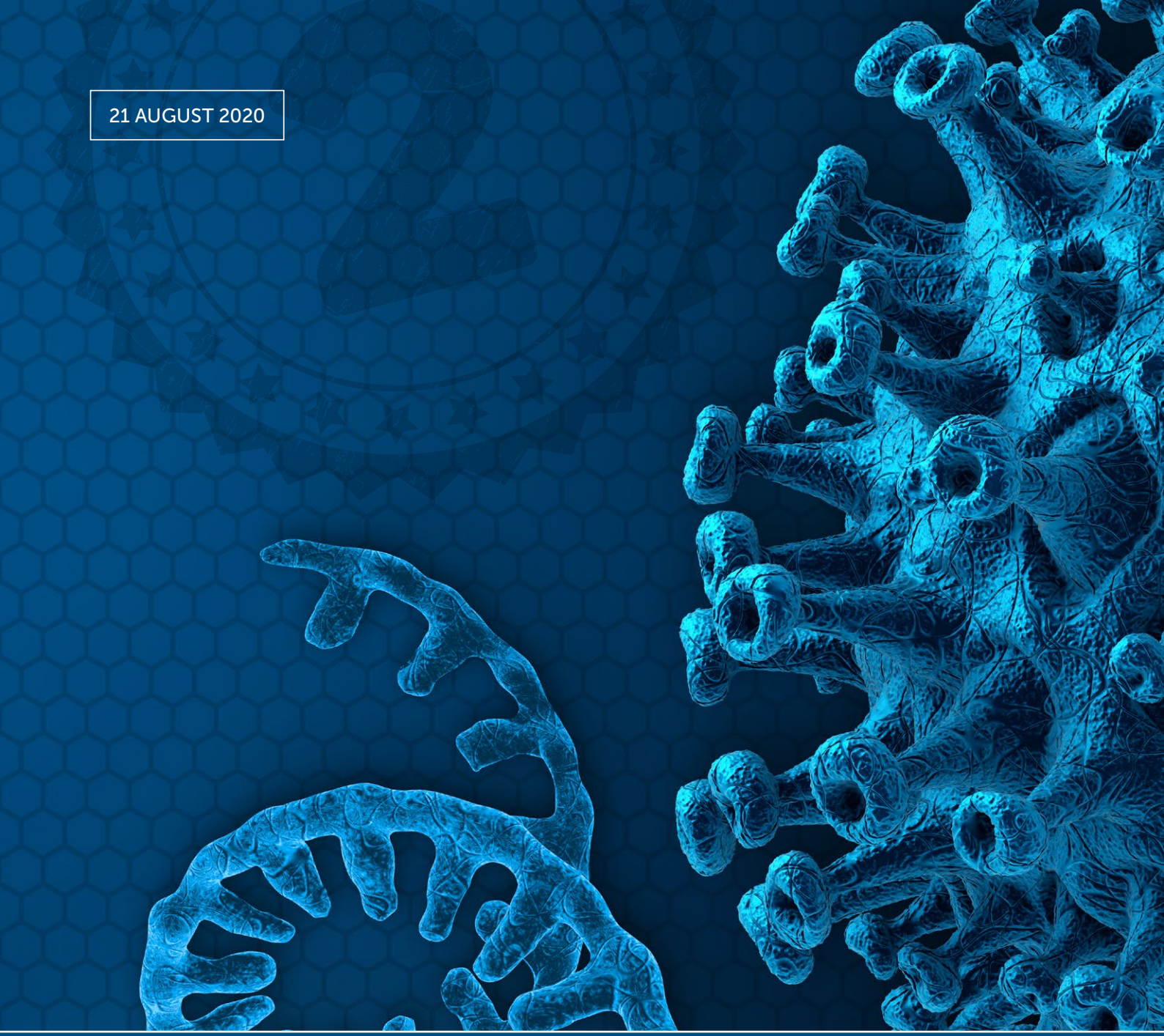
21 AUGUST 2020



Employment Revival Guide

Alert Level 2 Regulations

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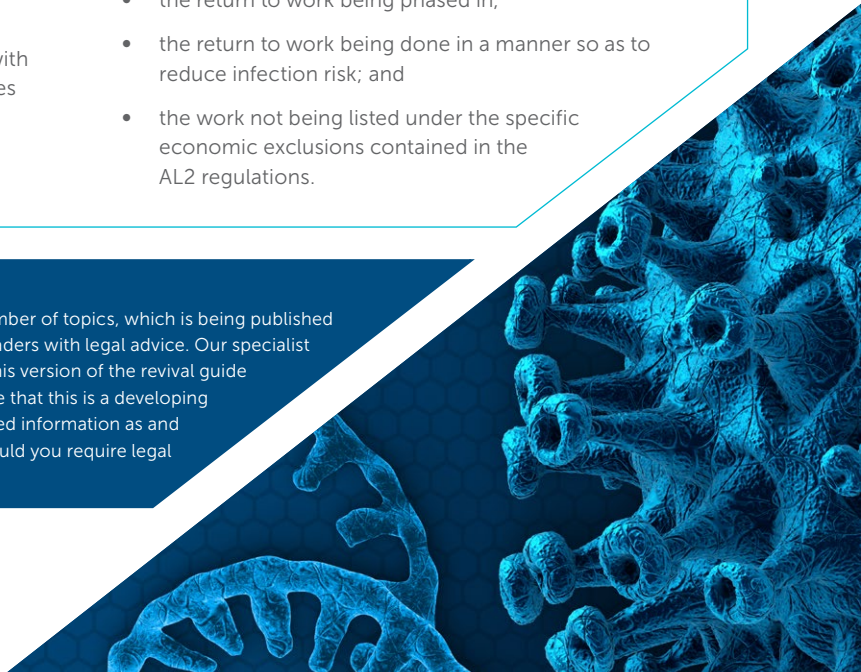
Employment Revival Guide: Alert Level 2 Regulations

Following a drop in the number of active COVID-19 cases nationwide, on 15 August 2020, the President announced that the country would move to Alert Level 2 (AL2). AL2 of the lockdown is aimed at the recommencement of almost all economic activities and allowing most employees to resume work under certain conditions, save for very limited exceptions. While the President has allowed the recommencement of most economic activities, he has also cautioned the nation in relation to relevant health and safety protocols so as to ensure that South Africa is not subject to a "*second wave*" of COVID-19 infections. Accordingly, businesses remain obligated to comply with all health and safety protocols issued by the government, including social distancing, hygiene standards and the wearing of "*face masks*".

Employees who can work from home, particularly those who are considered "*vulnerable*", remain encouraged to do so. Employers must take special precautions to ensure the health and safety of vulnerable employees who are accommodated in the workplace in accordance with the relevant guideline. The purpose of this guide is to assist employers with the continuation or resumption of operations in accordance with AL2.

1. Employers' duties

- Employers with more than 100 employees working together in a group on the same floor space must, where possible, make provision for minimising the number of employees at the workplace at any given time through rotation, staggered working hours, shift systems and the like.
- Develop a workplace plan for a phased in return to work prior to reopening the workplace for business. The workplace plan must correspond with Annexure E of the Level 3 Regulations and must be retained for inspection.
- The workplace plan must include a procedure for the compulsory screening of all persons entering the workplace as well as a procedure for the safe evacuation of persons from the workplace who present with symptoms of COVID-19, without endangering other employees or the public.
- The information contained in the workplace plan must also include, *inter alia*, the details of the employees permitted to return; how the employer intends to phase in the return to work, the details of the COVID-19 Compliance Officer and the health and hygiene protocols.
- Provide employees who may come into direct contact with members of the public as part of their employment duties with sufficient protective equipment.
- Provide hand sanitisers at entrance and exit points and bathroom facilities for employees to use.
- Sector-specific health protocols, where these are still to be developed, must be developed in consultation with the Department of Health.
- For the duration of the national state of disaster, any person who hinders, interferes with, or obstructs an enforcement officer in the exercise of his or her powers, or the performance of his or her duties in terms of the regulations or who fails to adhere to the regulations, is guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.
- Under AL2, all persons who are able to work from home must do so. However, persons will be permitted to perform any type of work outside the home and travel to and from work subject to:
  - compliance with health protocols and social distancing measures;
  - the return to work being phased in;
  - the return to work being done in a manner so as to reduce infection risk; and
  - the work not being listed under the specific economic exclusions contained in the AL2 regulations.



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2. Manufacturing, construction, business and financial firms who employ more than 500 employees

Employers in the manufacturing, construction, business and financial services industries, who have more than 500 employees, must adhere to the appropriate sector or workplace arrangements to address the following:

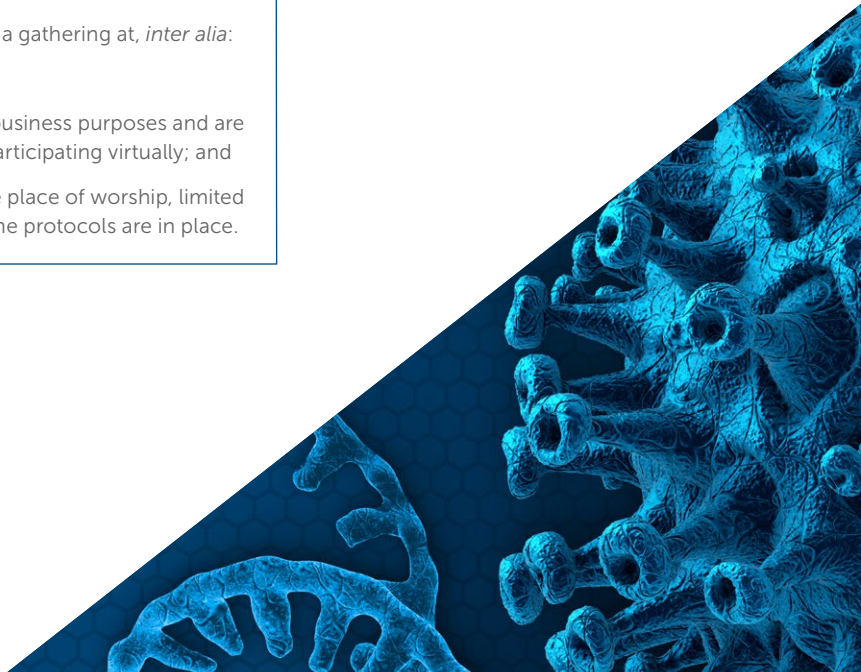
- provide or arrange transport to their employees coming to site, or where this is not possible, consider staggered working time arrangements to reduce congestion in public transport;
- stagger the return to work of employees to ensure workplace readiness and avoid traffic congestion during peak travel times as a result of the return to work;
- screen employees daily for systems of COVID-19 and refer employees who display symptoms for medical examination and testing where necessary; and
- submit data collected during the screening and testing process to the Director-General: Health.

3. COVID-19 Compliance Officer

- The employer must designate an employee in writing as a Compliance Officer. The Compliance Officer's duties are to ensure the implementation and compliance with:
  - COVID-19 prevention measures;
  - COVID-19 health and hygiene protocols; and
  - the workplace plan.
- The name and contact information of the Compliance Officer must be displayed in a visible area and must be communicated to employees.
- The requirement for the appointment of the COVID-19 Compliance Officer applies to all industries and business entities, both in the private and public sectors. The Compliance Officer must work with the Health and Safety Committee to ensure that the workplace remains safe and all transmission risks are mitigated insofar as possible.

4. Social and physical distancing

- The employer must determine the workplace area in square metres and take appropriate measures to maintain physical distancing of at least one and half metres between customers, clients and/or employees.
- Social distancing includes enabling employees to work from home or minimising the need for employees to be physically present in the workplace as well as restricting face to face meetings.
- An employer must take special measures for employees with known or disclosed health issues or conditions which may place such employees at higher risk of complication or death if they are infected with COVID-19.
- An employer must take special measures for persons above the age of 60 who are at risk of complications or death if they are infected with COVID-19 and allow them to work from home where possible.
- An employer must ensure that employees in courier or delivery service have minimal personal contact during delivery.
- In terms of AL2, all gatherings remain prohibited, except a gathering at, *inter alia*:
  - A workplace for work purposes;
  - Conferences and meetings which are restricted to business purposes and are subject to a 50-person limitation, excluding those participating virtually; and
  - Faith-based institutions depending on the size of the place of worship, limited to 50 persons, provided COVID-19 health and hygiene protocols are in place.



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5. Prohibited economic activities

In terms of AL2, all economic activities may resume, save for the following:

- night clubs;
- international passenger air travel for leisure purposes;
- passenger ships for international leisure purposes;
- attendance of any sporting event by spectators;
- international sports events; and
- other restrictions related to public transportation and education as set out in the directions to be issued by the cabinet members responsible for the portfolio.

The consumption of food and beverages, including the sale of alcoholic beverages, is now permitted in public places provided that restaurants adhere to the nationwide curfew of 10pm to 4am. The only persons exempt from the curfew are essential service workers.

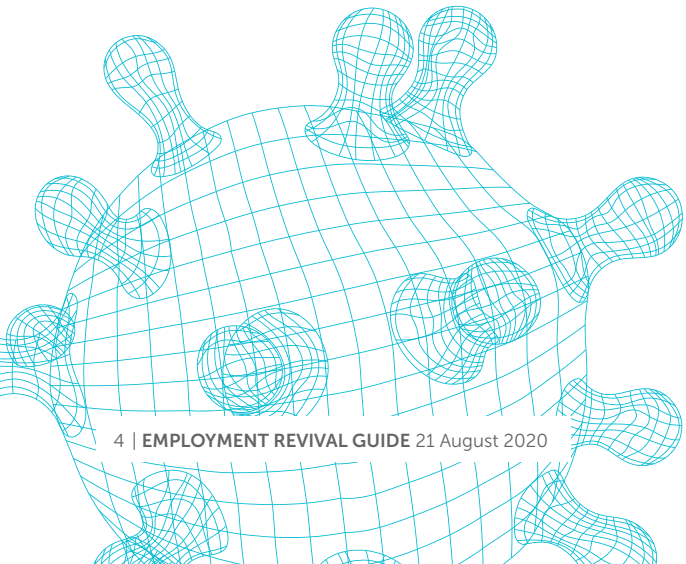
AL2 has also seen the commencement of inter-provincial travel for any reason whatsoever as well as an attempted rejuvenation of the local tourism industry through the opening of all hotels and leisure accommodation.

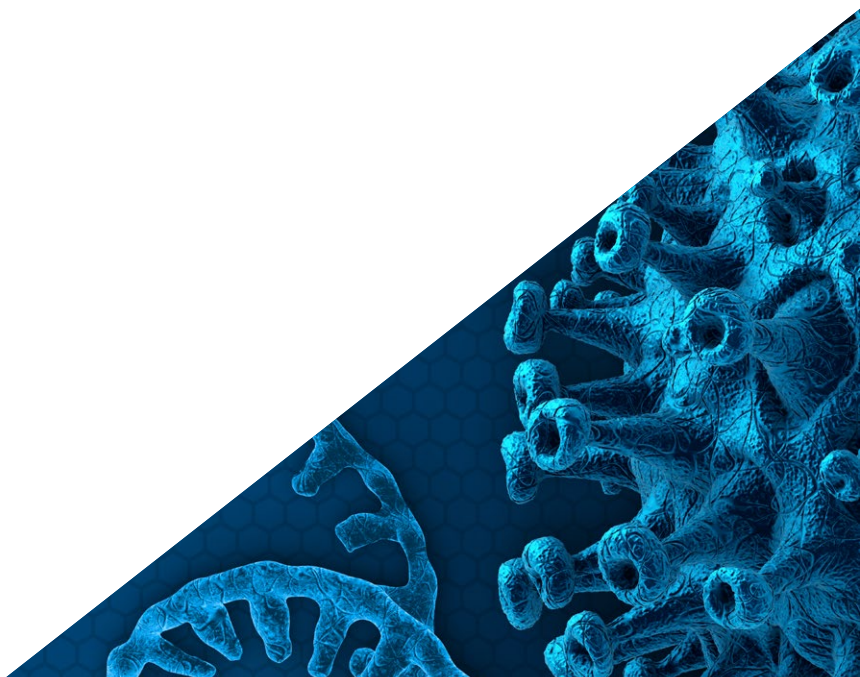
6. Vulnerable employees and workplace accommodation

In the terms of the guidance document published by the Department of Health on 25 May 2020 (Guidance Document), employers are required to identify employees who are at high risk of developing severe illness from COVID-19, or reside with or care for persons who are at high risk of developing severe illness from COVID-19. This obligation is in line with an employer's duty to adopt special measures for employees with known or disclosed health issues, comorbidities or any other condition which does or may place those employees at a higher risk of complications or death if they are infected with COVID-19.

7. How does an employer identify employees who are considered high risk in terms of the applicable regulations and Guidance Document?

- In terms the Guidance Document, a vulnerable employee is broadly the following persons: (i) older persons, (ii) persons with impaired function of certain organs, or (iii) those with a depressed immune system and are thus at a higher risk for serious complications and severe illness from COVID-19.
- These category of persons include those who are over the age of 60 years old, those with underlying commonly encountered chronic medical conditions, particularly if not well controlled, including persons with diabetes, chronic lung disease and moderate/severe hypertension; persons who are severely obese; those who are immunocompromised and pregnant persons over 28 weeks.





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8. How does an employer assess whether a vulnerable employee may return to the workplace?

- The worker should be assessed by his/her treating doctor, or where the employee cannot afford same, the employee should be assessed by a doctor, at the expense of the employer, preferably one who has insights into the workplace and its processes.
- The doctor should provide a confidential note to the employer indicating the presence of a condition that may render the employee high risk, from the list contained in the Guidance Document, without giving a specific diagnosis.
- Where the employee has a condition that is not listed in the Guidance Document but has a condition that may nevertheless render the employee a vulnerable employee, a motivation from the doctor is necessary.
- The doctor should ensure that the employees' health is fully optimised which may include recommending flu vaccinations and continuous advice on maintaining a compliance and treatment plan.

9. How does an employer protect and manage vulnerable employees in the workplace?

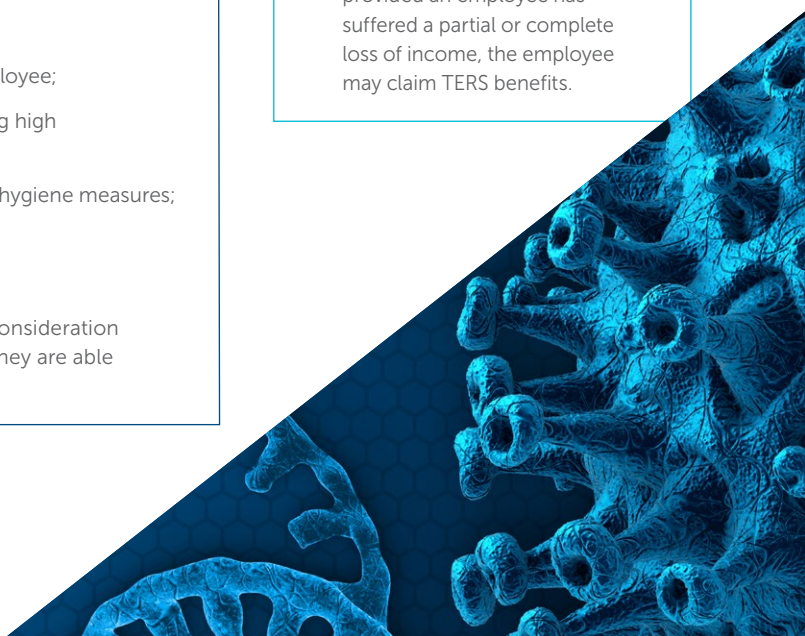
- The Guidance Document suggests *inter alia* the following:
  - a clear and transparent policy to address the needs of vulnerable employees in the workplace beyond the risk control measures for other employees; and
  - taking into account the individual circumstances of the employee in relation to their work environment and activities including eliminating or reducing the potential exposure to COVID-19 in their current job. In addition, employers may also explore temporary workplace accommodation in consultation with the employee, where potential exposure cannot be eliminated or reduced.

10. What other options are recommended to reduce the potential exposure to COVID-19 vis-à-vis vulnerable employees?

- The Guidance Document recommends *inter alia*:
  - alternative temporary placement/redeployment of the employee;
  - restriction on certain duties and a prohibition on performing high risk procedures;
  - stricter physical distancing protocols, barriers or additional hygiene measures;
  - protective isolation; and
  - specific PPE appropriate to the risk of the task/activity.
- Where the recommended alternatives are not possible, then consideration should be given for an employee to work from home, where they are able to do so.

11. Where a vulnerable employee cannot work from home, what leave procedures will apply to the said employee?

- Where possible, an employee should be declared temporarily incapacitated should workplace accommodation not be possible and provided it has been motivated by a doctor/occupational medical practitioner.
- Where temporary incapacity is impossible, the employee should be entitled to use their sick leave if appropriate.
- Where an employee's sick leave is exhausted, employees may use their annual leave.
- Where applicable, the business must access the eligibility of the employee to receive additional company benefits and/or UIF.
- Unpaid leave in these circumstances is not recommended and the Guidance Document stipulates that where it is contemplated, it must be as matter of last resort.
- In terms of the TERS directive issued on 11 August 2020, where an employer is unable to accommodate a vulnerable employee in the workplace, provided an employee has suffered a partial or complete loss of income, the employee may claim TERS benefits.



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12. How does an employer manage the incapacity or alternatively the return to work of a vulnerable employee?

- The Guidance Document recommends, *inter alia*, the following:
  - adequate compensation claim processing and rehabilitation if the exposure was work related;
  - employees with mild illness should complete the mandatory 14 days isolation and return to work; and
  - employers must ensure that any sick leave related to workplace-acquired COVID-19 related illness is managed under COIDA procedures.

Health and safety

On 4 June 2020, the Department of Employment and Labour issued a consolidated directive on health and safety protocols in the workplace, that consolidate and repeal all other directives issued in this regard (C19 OHS). The purpose of C19 OHS was to clarify the health and safety measures to be taken by employers in order to protect workers and members of the public who enter their workplaces or who are exposed to their working activities. The purpose of the C19 OHS is also to ensure that the measures taken by employers under the Occupational Health and Safety Act 85 of 1995 (OHS Act) are consistent with the overall national strategies and policies to minimise the spread of COVID-19. Under AL2, all employers are advised to adhere to all health protocols in place including any the C19 OHS. AL2 regulations also dictate that all persons employed in private residences must adhere to relevant health and safety protocols and social distancing measures. In addition, the C19 OHS incorporated the Guidance Document by reference, thus arguably rendering the Guidance Document binding.

13. Who is considered a "worker" in terms of C19 OHS?

Any person who works in an employer's workplace, including an employee of the employer or a contractor, a self-employed person or volunteer.

14. Who does the C19 OHS apply to?

The C19 OHS applies to employers and workers in respect of the manufacturing, supply or provision of essential goods or services, as defined in Schedule 2 of the Regulations in terms of section 27(2) of the Disaster Management Act (DMA), and any workplace permitted to continue or commence operation before the expiry of those Regulations. The C19 OHS also applies to those employers who are not permitted to commence operations in terms of AL2.

15. What are the symptom screening requirements for employers?

- Every employer must take measures to screen any worker at the time they report for work to ascertain whether they show any COVID-19 symptoms, for example fever, cough, sore throat, redness of eyes, shortness of breath or breathing difficulties.
- Every employer must require every worker to report as to whether they suffer from the following symptoms: body aches, loss of smell or taste, nausea, vomiting, diarrhoea, fatigue, weakness or tiredness.
- Every employer must require workers to immediately inform the employer if they experience any of the above-mentioned symptoms while at work.
- Employers must comply with any guidelines issued by the National Department of Health in respect of symptom screening and medical surveillance and testing, if required.
- Employers in the manufacturing, construction, business and financial service firms who employ more than 500 employees are required to submit their records of screening and testing to the Director General: Health.

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16. What must an employer do when a worker presents, or informs the employer of, symptoms of COVID-19?

- The employer must not permit the worker to enter the workplace or report for work.
- If the worker is already at work, the employer must immediately isolate the worker, provide them with an FFP1 surgical mask and arrange for the transportation of the worker to self isolation, or to a medical facility for medical examination or testing. The transportation of the worker must not place other workers or members of the public at risk.
- The employer must also assess the risk of transmission, disinfect the area and the worker's workstation, refer other workers who may be at risk for screening and take any other appropriate measure to prevent possible transmission.

17. Can an employer place a worker who presents symptoms of COVID-19 on sick leave?

Yes, the employer must place this employee on sick leave in terms of section 22 of the Basic Conditions of Employment Act 75 of 1997 (BCEA). If the employee's sick leave entitlement is exhausted, the employer must make an application for an illness benefit in terms of TERS.

18. What measures must the employer take to prepare the workplace during COVID-19?

- The employer must ensure that all work surfaces and equipment are disinfected before work begins, regularly during the working period and after work ends.
- Disable biometric systems or make them COVID-19-proof.
- Insofar as possible, the workplace must be rearranged so as to ensure that the requisite social distancing is maintained.

19. Would it be advisable to test employees before they leave the employers' premises to detect whether an employee has developed a fever during the day's shift and to ensure the employee does not report to work the following day?

It is advisable that the employer temperature tests their employees before they leave the employer's premises an employer may be vicariously liable should the employee become infected whilst on the employer's premises. If the employee contracts the disease during the course and scope of their employment, e.g.: doctors and nurses, the employee will have a claim under Compensation for Occupational Injuries and Disease Act 130 of 1993 (COIDA).

20. Can the employer deduct money from employees' salaries for hand sanitizers and disinfectants placed at the workplace or provided to employees?

No, the employer must, at no cost to the employee, ensure that there are sufficient quantities of hand sanitizer based on the number of workers or other persons who access the workplace at the entrance of, and in, the workplace which the workers or other persons are required to use.

21. is an employer still required to provide the employee with hand sanitizer?

The employer must provide adequate supply of hand sanitizer to every employee who works away from the workplace, other than the employee's at home.

Employment Revival Guide: Alert Level 2 Regulations*...continued*

22. Must employers provide face masks to its employees?

- Yes, employers are required to provide each of its employees, at no cost, with a minimum of two cloth masks, which comply with the requirement set out in the Guidelines issued by the Department of Trade, Industry and Competition, for the employee to wear while at work and while commuting to and from work.
- It is mandatory for all persons to wear a face mask when in public, which includes the workplace.
- A *"face mask"* refers to a cloth face mask or a homemade item that covers the nose and mouth, or another appropriate item to cover the nose and mouth.

23. What other PPE is required?

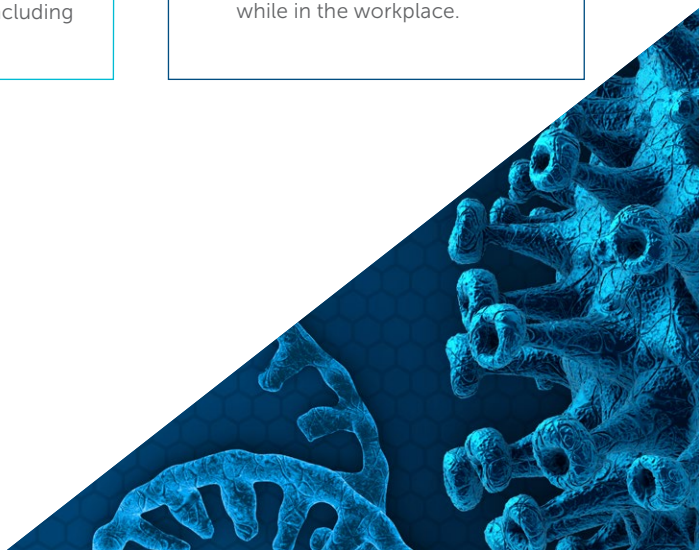
- The employer must check the websites of the National Department of Health, the National Institute of Communicable Diseases and the National Institute for Occupational Health on a regular basis to assess whether any additional PPE is required or recommended in any guidelines given the nature of the workplace or the nature of a worker's duties.
- Additional PPE may include the use of screens where an employee interacts with the public as well as face shields where necessary.

24. Are employers liable for the health and safety standards of employees' homes where their employees are working from home? Can an employer be held liable for an employee contracting an illness, including COVID-19, while working from home?

- No. 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.

25. What are the employer's social distancing requirements?

- The employer is required to arrange the workplace to ensure that there is a distance at least one and a half metres between workers and members of the public or between members of the public; or put in place physical barriers or provide workers with face shields or visors.
- The employer must take measures to ensure that social distancing is maintained in the workplace common areas including the staggering of tea breaks and meal breaks to ensure that employees are not gathering during these times.
- The employer must take measures to minimise contact between workers and contact between workers and the public.
- If appropriate, undertake symptom screening measures of persons other than the employees entering the workplace with due regard to available technology and any guidelines issued by the Department of Health.
- If appropriate, display notices advising persons other than employees entering the workplace of the precautions they are required to observe while in the workplace.



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26. Do employees have obligations?

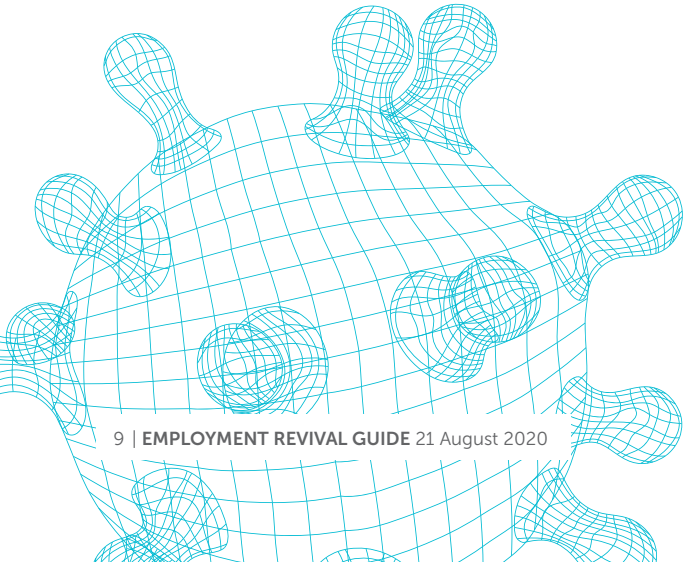
- The employee and the employer share the responsibility for health and safety in the workplace. Therefore, both the employee and employer must pro-actively identify dangers and develop control measures to make the workplace safe.
- For this reason, employees should abide by any policies adopted by the employer to curb the spread of COVID-19. Employees should also inform their employer if they are aware of any risk to the health of their colleagues. Employers may expect union demands before their members return to work.
- In addition, an employee has a public law duty to ensure that they wear a face mask whenever they are in public, including the workplace.

27. What does the Notice on Compensation for Occupationally-Acquired Coronavirus Disease (COVID-19) under COIDA (the Notice) issued by the Minister cover? Will it apply after the lockdown?

- The Notice extends compensation under COIDA to occupationally acquired COVID-19 if it is contracted by an employee arising out of and in the course and scope of his/her employment. It will apply until being revoked.
- Section 35 of COIDA, indemnifies the employer and only applies when the disease was contracted as a result of the course and scope of employment. It does not apply merely because the infected person is an employee of the employer.

28. What are the considerations regarding COVID-19 and pregnancy in the workplace?

- In terms of the common law, an employer has a duty to provide a safe working environment for its employees. This is further qualified by the legal obligation of an employer to maintain a working environment that is safe and healthy, as determined by the OHS Act. Similarly, the BCEA expressly provides for the protection of employees before and after the birth of a child, in that no employer may require or permit a pregnant employee (or an employee who is nursing her child) to perform work that is hazardous to her health or the health of her child. There are various steps an employer may consider to give effect to its obligation towards a pregnant employee.
- The Guidance Document which is incorporated into the C-19 OHS by reference classifies pregnant persons who are more than 28 weeks pregnant as vulnerable persons and therefore employers are required to make special provision to accommodate and ensure the safety of pregnant persons in the workplace.



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TERS and other remuneration related issues

The Temporary Employer/Employee Relief Scheme (C-19 TERS) Directive was created to ensure that workers who have lost income due to the pandemic or who were required to take annual leave, receive special benefits from the UIF to avoid them being laid off.

29. What is the special benefit and how is it calculated?

- The scheme pays a portion of the salary of the employees where the employee has suffered a loss of income for various reasons which pertain to the COVID-19 pandemic. The salary taken into account to calculate the benefits is capped at a maximum amount of R17,712. The UIF calculates the benefit according to the income replacement sliding scale (38%-60%) as provided in the Unemployment Insurance Act 63 of 2001 (the UI Act). As an example, an employee earning R17,712 or above will receive a benefit of R6,730 (38% of the maximum). Employees earning less will receive a greater percentage of up to 60% at the lowest salary level.
- If the benefit falls below R3,500 according to the income replacement sliding scale the employee receives R3,500.

30. How much must the employer claim in respect of an employee?

The UIF calculates the benefit according to the income replacement sliding scale (38%-60%) as provided in the UI Act. The employer does not calculate the benefit.

31. The Directive urges employers to pay the employees the TERS benefit and set the payment off against the payment from UIF. What is the amount?

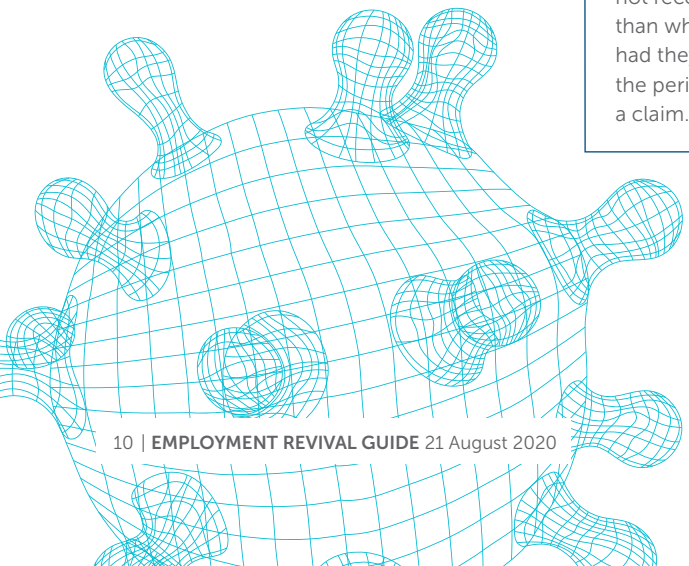
The amount must be calculated in accordance with sections 12 and 13 of the UI Act and in accordance with the calculator provided. In terms of the TERS Directive issued on 11 August 2020, an employee may not receive a TERS benefits more than what they would have received had they ordinarily worked during the period for which they submit a claim.

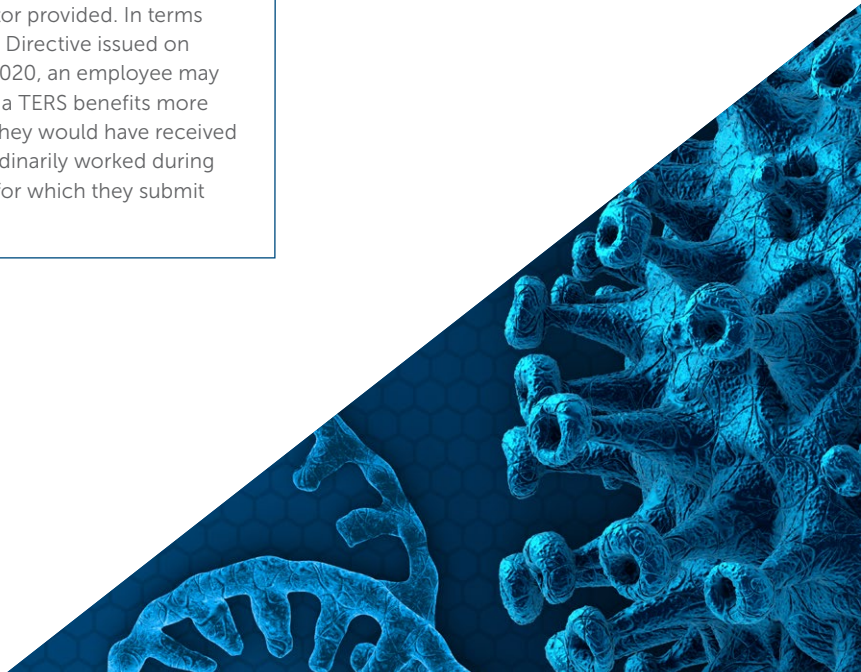
32. What is the difference between the online portal application and the online email application for TERS as released by the Department of Employment and Labour?

Employers have been redirected to the online portal in terms of the latest autoreply from the covid19ters@labour.org.za email address. Employers are encouraged to make an online application, by following the instructions received on the automatic reply. The application process for TERS benefits remain the same.

33. Is there a TERS claim if the employer advanced the employee a loan *in lieu* of paying a salary?

Yes. The employee may claim, as a loan is not the same as payment of remuneration. Loans should be interest free as otherwise it may constitute a credit agreement and the employer must register as a credit provider.





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34. When UIF does not pay immediately, can an employer give its employees a "*loan*" and then pay them the salary based on what the UIF actually paid them and recover the balance of the loan?

- This will be determined by the type of agreement entered between the employer and the UIF. This will also be determined by the membership of a bargaining council. Were money to be forwarded to employees prior to the receipt of funds from TERS, this would constitute a loan and not remuneration. In addition, were the loan to be interest free, it would not constitute a credit transaction for the purposes of the National Credit Act 34 of 2005.
- It is advisable to attempt to reach a written agreement with employees laying out the terms of any such loan. It is important as this would see an acknowledgement that the payment is a loan and that the loan will be repaid by the money received from UIF. If such an agreement were to be accepted, the salary would constitute a loan and the amount could be reclaimed from the UIF.
- It is important to keep an accurate record of all correspondence and attempts to contact employees for the purposes of this loan agreement so that money can be efficiently recovered from TERS.

35. May the employer submit a TERS claim if it paid the employees in full when they did not work?

The directive is silent on this. The Memorandum of Undertaking that must accompany the claim makes provision that the company may reclaim the benefit. An employee may not benefit more than what they should have been paid. The employee must have suffered a loss of income before there is a TERS claim.

36. What is the closing date for reduced work time benefits and TERS applications?

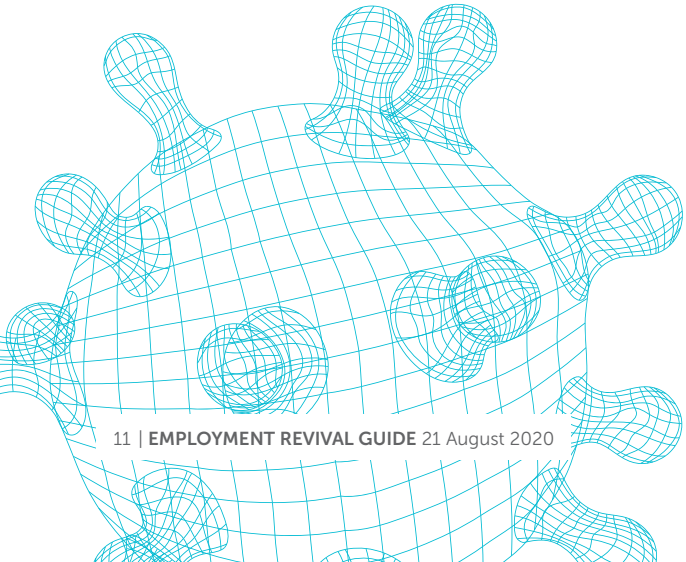
The latest TERS Directive issued on 11 August 2020 extends the operation of TERS benefits to 17 August 2020.

37. In terms of the new TERS Directive issued on 11 August 2020, what category of employees may claim TERS benefits?

- Employees whose employers are unable to make use of their services fully or partially due to regulations published by the Minister related to the limitation of employees at the workplace. This includes employees on a shift system, short time or staggered working hours.
- Employees whose employers are not permitted to commence operations (partially or fully).
- Vulnerable employees whose employers are unable to make alternative arrangements for them to attend work.
- Employees whose employers are unable to make use of their services fully or partially due to operational requirements.

38. An employer has already applied for the reduced working time benefit in terms of section 12(1B) of the UI Act, as they did not suffer financial distress, which was previously a requirement to apply for TERS. Now the employer wishes to apply for TERS. Can they change course?

Should the employer wish to do so, they should clearly disclose their position upon application for TERS, including the reason why they are changing course, for example that they have not yet received a response on the first application in terms of section 12(1B) of the UI Act.



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39. May a TERS claim be submitted for an employee on short time?

If the short time (reduced hours) is as a result of a partial closure of the operations of the employer due to COVID-19, there is a TERS claim. Alternatively, an employee may claim the reduced hours benefit ordinarily provided by the UI Act.

40. If an employee is on short time, are they able to claim UIF?

Whether an employer is claiming from the UIF in terms of the provisions of the UI Act or they are claiming under TERS, there must be an agreement in place in relation to the short time.

41. Who must claim?

- A Bargaining Council (BC) may enter into a MOA with the UIF. The parties to the BC must have entered into a BC collective agreement extended by the Minister to non-parties in the sector. Employers must submit their claims in the sector to the BC. The BC must open a special bank account to administer the funds.
- In the absence of a BC, an employer who employs more than 10 employees submitting a TERS claim must enter into a MOA with the UIF. When the employer receives payment, the employer must pay the employees within two days.
- An employer who employs 10 or fewer than 10 employees may claim on their behalf but the UIF will make payment directly into the bank accounts of the employees.

42. May an employee submit a TERS claim?

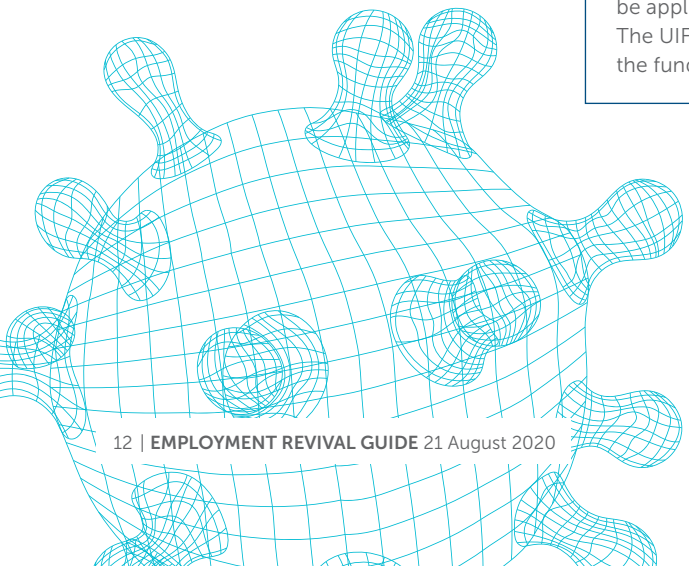
Only if the employer failed to submit a claim on their behalf.

43. What protection is there for monies paid in terms of TERS?

The funds paid in terms of TERS do not fall into the general assets of the recipient employer or BC and must be applied in terms of TERS only. The UIF may audit the distribution of the funds.

44. May employees that were on maternity leave when the lockdown commenced and are due back during the course of the lockdown be added to the TERS claim?

- Where the employee is on maternity leave during lockdown, and the company has adopted the practice during lockdown not to pay its employees, she will be entitled to claim in the normal course to the UIF. There would be no TERS claim simply because an employee can't receive more than 100% of what she would have ordinarily received had she been paid by her employer.
- If the employer made the decision to pay its employees during the lockdown but stopped paying because it might have been entitled to do so, then the employee would be entitled to make a TERS claim.
- When the employee returns to work, she will be in the same position as any other employee, whether that be as an employee in essential services being paid either in part or in full, or any other employee who would not be paid. She would be entitled to claim in terms of TERS if she suffers a loss of income.
- In the specific circumstance where an employer pays its employees for the full 21 days of the initial lockdown, does not claim under TERS, and further must comply with a collective agreement that gives rise to certain maternity benefits, the employer would continue that payment as a result of the underlying collective agreement. In this case, there is no reason not to pay the employee.



Employment Revival Guide: Alert Level 2 Regulations*...continued*

45. If an employer reduces basic salaries but they still amount to more than R 17,712, can an employer still apply for a top up from TERS for the balance? Would the employee qualify for the TERS benefit?

Subject to the amount of the benefit contemplated in clause 3.6 of the amended TERS directive published in May 2020, an employee may only receive a COVID-19 TERS benefit if the total of such benefit, together with any additional payment by the employer in any period, is not more than the remuneration that the employee would ordinarily have received for working during that period. This means that the employer is permitted to top up an employee's remuneration but only to the extent that it would meet their average remuneration.

47. An employee started in Feb and therefore has two payslips, but came from another company where he would have been contributing to UIF, must his Jan payslip from his previous employer be submitted to claim the benefit?

- UIF requires three payslips. It should be sufficient to submit the two payslips otherwise the directive does not make sense. It does not seem to have been the intention of the UIF to exclude these employees from receiving TERS benefits.
- The benefit available under TERS is separate from the standard UIF process. As it works independently, an employee will not necessarily require a January payslip.

48. What about an employee who started 1 April 2020 and the business is temporarily closed?

TERS seeks to cover employees who were employed when the closure or partial closure of the employer's operations commenced. However, in this instance, the employee in question had been due to be paid a salary for work commencing on 1 April 2020. Therefore, the employee should form part of the UIF application. Where the employee is unable to work from their start date due to the lockdown, the employer should assist by including them in the UIF application.

46. Can employees that are foreign nationals be added to the claim?

- There is nothing that expressly excludes foreign nationals from being added to the claim under TERS provided they fall within the definition of an employee for the purposes of the UI Act. Additionally, foreign nationals are able to claim compensation under the UI Act.
- Changes have been made to the required documentation to allow for the entering of a Passport number or an identity document number.
- There may be an issue with asylum seekers employed in South Africa as they are supposed to receive temporary passports that permit them to work and live in South Africa, however there have been significant bureaucratic delays. As such, asylum seekers may be denied access because of this technicality.

Employment Revival Guide: Alert Level 2 Regulations*...continued*

49. Where staff have not been working during lockdown, can an employer pay employees for overtime hours worked in the preceding month as part of the next month's salary to fill up normal hours for the month where employees have not worked?

- The overtime accrued in a month is payable as part of that month's remuneration. The employer cannot in the absence of an agreement apply the overtime as payment for normal hours in the following month.
- The employees do not receive their salary due to the partial or complete closure of the employer's operations as a result of COVID-19, and the employer must submit a TERS claim on behalf of the employees.

50. Is an employee entitled to the normal pay for the public holidays even if the employee is on layoff? Is there a TERS claim?

The employee is not entitled to normal pay as the employee cannot work. Where the employer agreed to pay the employee, the employee may be entitled to normal pay depending upon the terms of the agreement and there may be a TERS claim. The employee is not to be prejudiced in this regard.

51. Is there a TERS claim where the employer required the employee to take annual leave during the lockdown in terms of section 20 (10) of the Basic Condition of Employment Act?

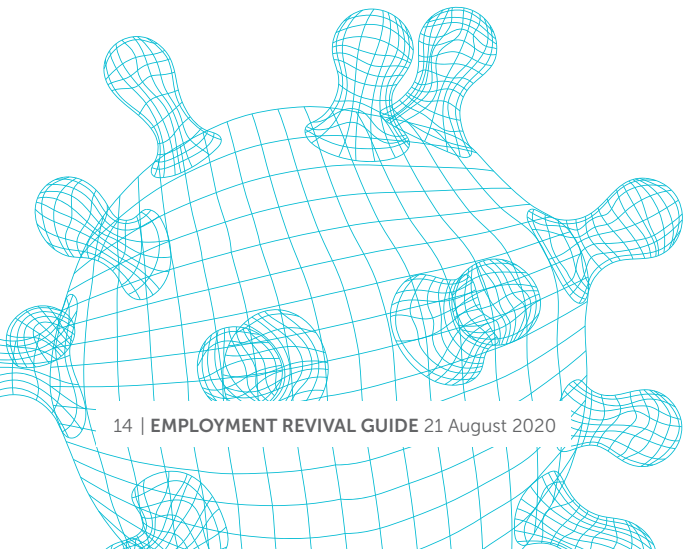
- An employer, who has required an employee to take annual leave may set off any amount received from the UIF in respect of that employee's COVID-19 benefit against the amount paid to the employee in respect of annual leave provided that the employer credits the employee with the proportionate entitlement to paid annual leave in the future.
- In addition, in terms of a TERS Directive published on 26 May 2020, the purpose of the TERS directive has been extended to include providing a benefit to workers who have been directed to take annual leave in terms of the relevant provisions of the BCEA.

52. What about employees placed on annual leave during the lockdown - do they get paid for public holidays and, if not, may they claim under TERS?

Employees on annual leave must be paid for the Public Holiday as under normal circumstances. There is a TERS claim in respect of the annual leave provided an employee is credited with the proportionate leave entitlement.

53. Employees are on a Fixed Term Contract ending March 2020. Business closed. They have no annual leave to utilise while on lockdown. Must the employer implement unpaid leave or pay a prorated salary? Is there a TERS claim?

If the end date is clearly stipulated in the fixed-term contract, the contract must end, even during the lockdown. While the company can use their discretion regarding negative leave, it is recommend that an agreement is reached between the employer and employee regarding negative leave.



Employment Revival Guide: Alert Level 2 Regulations*...continued*

54. The Company originally consulted with the employees and advised that there will be a pay cut during lockdown and confirmed that once operations returned to normal, the short payment in the pay cut will be refunded. May an employer legally change their mind and force staff to take unpaid leave during lockdown even though the staff have now worked full time?

- The company is obliged to consult in order to implement this or in cases where the company has a possible layoff in mind. This can only be done through consultation in terms of section 189 of the LRA.
- The unpaid leave/layoff proposal should be offered to employees as an alternative to termination due to operational requirements (economic, technological and structural needs of the employer). The employer would need to enter into a retrenchment procedure to change the employees' terms and conditions of employment. The alternative to retrenchment will be a reduction of hours of work with the proportionate reduction of pay.

55. How are commission earners who cannot work affected? What is their "*salary*"?

There is a TERS claim if the employee is registered with UIF or where an employee is not registered with the UIF as a result of the employer's omission, but falls within the ambit of employee as contained in the UI Act. Section 12 of the UI Act requires the average income over the preceding 13 weeks to be considered if there is a significant fluctuation in income, in the absence of a basic income.

56. Is TERS available to essential service companies?

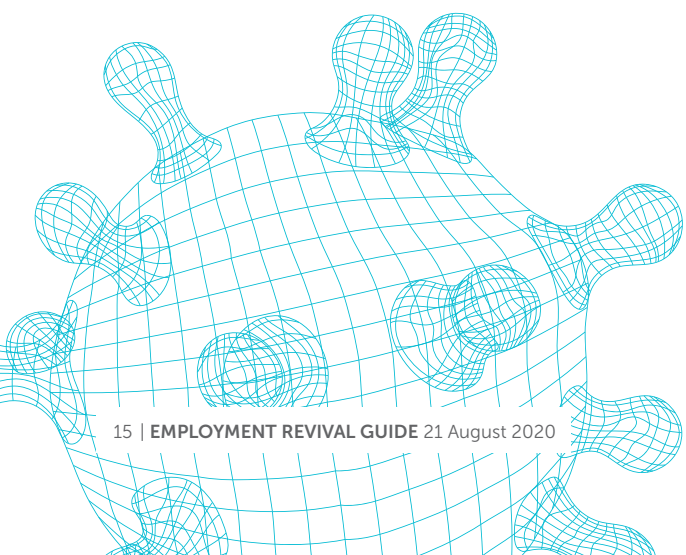
- Yes, it is, but only if the company had to implement a temporary partial or complete closure of their business operations due to the COVID-19 pandemic in accordance with the requirements of the regulations.
- A TERS claim may also be submitted as an essential service as it may not be the entire workforce that is unable to operate but sections of it. Where there is loss of income there is an opportunity to claim under TERS.

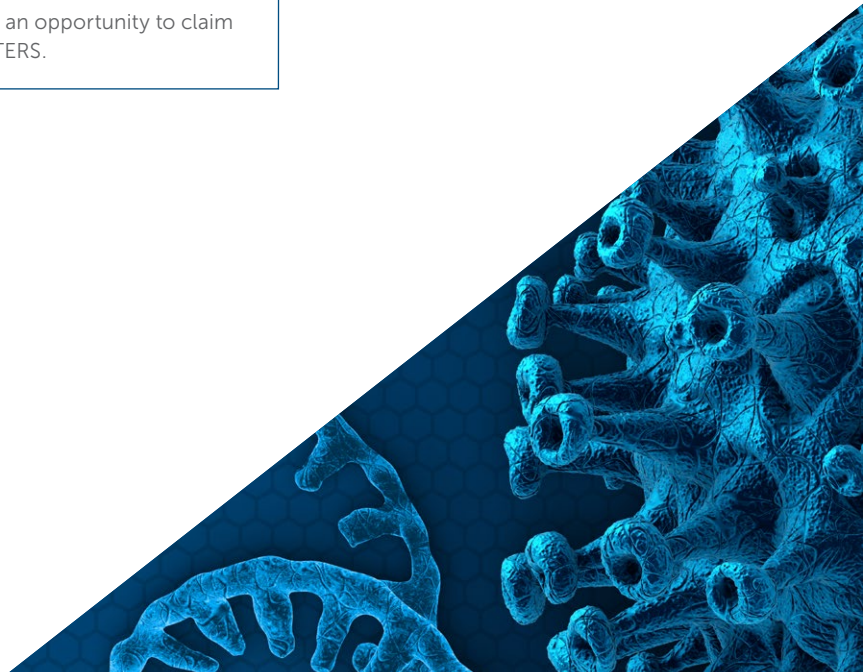
57. Can a company implement a temporary layoff as from 1 May to 17 August 2020 and claim in terms of TERS?

Yes, provided the layoff is done by agreement and there is a TERS claim if it is due to a temporary closure or part thereof of the business operations of the employer due to COVID-19. This is however debatable.

58. Would TES employees who earn above the threshold be entitled to claim from TERS if they took pay cuts?

Yes, there is a TERS claim if the pay cut is due to the closure of the business operations of the employer or a part thereof. In terms of section 9.3 of the amended TERS directive published in May 2020, the maximum remuneration that an employee can receive from the benefit is R17,712.00 per month.





Employment Revival Guide: Alert Level 2 Regulations*...continued*

59. The employer is in the manufacturing sector and employs weekly paid wage earning staff. The business is closed and it is a non-essential service. The employer agreed to pay its staff during the lockdown thinking it can claim the payments back from UIF (TERS). Is that possible? How is that done? The employer does not have the funds and needs to recoup the payments.

Any staff member who is "*laid off*" temporarily and cannot work during the lockdown period can be applied for in terms of TERS, so long as the employee in question had been registered for UIF or those who are defined as employees in terms of UI Act but were not registered for UIF as a result of a failure by the employer.

60. Must a company be in financial distress before there is a TERS claim?

No. Section 3.7 of the amended TERS directive published in May 2020, lists the requirements that a company should satisfy before it can claim from the Fund, namely:

- the company must be registered with the UIF; The company must have complied with the application procedure for the financial relief scheme; and
- the company's closure must be directly linked to the COVID-19 pandemic.

61. If an employee is retrenched during the lockdown because of the National Disaster, may the employee claim under TERS or simply in terms of UIF? For how long?

TERS is only available for temporary closures of the operations or a part thereof of the business of the employer as a consequence of COVID-19. It is not reasonable to retrench employees due to a partial closure. Having been retrenched the employee has a UIF claim based on the applicable formula having regard to how long he was a contributor.

62. What is the illness benefit in terms of TERS?

- C-19 TERS provides that where an employee is quarantined for 14 days the employee shall qualify for the illness benefit. Confirmation letters from the employer and the employee that the employee was in an agreed pre-cautionary self-quarantine are sufficient to obtain the benefit.
- Where an employee is quarantined for a period of longer than 14 days, a medical certificate from a medical practitioner is required accompanied by the prescribed continuation from before payment will be made.

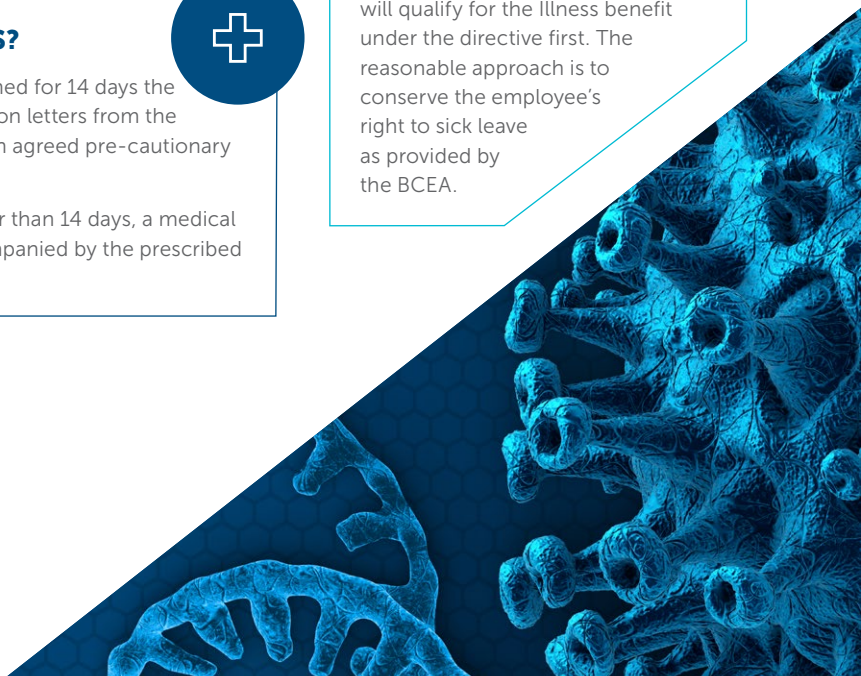
63. Until when is the illness benefit available?

The illness benefit is available for three months.

64. In the case of an employee diagnosed with COVID-19, will they first be entitled to the normal sick leave instead of claiming the illness benefit in terms of TERS or COIDA?

COVID-19 has recently been declared an occupational disease in terms of COIDA. This means that if an employee is absent from work due to contracting the virus during the course and scope of his/her employment, such leave will be covered in terms of COIDA. All claims for the contraction of COVID-19 in the workplace must now be dealt with in terms of the Directive for Compensation on Workplace Acquired Novel Corona Virus Disease dated 30/06/2020.

If the employee contracted the COVID-19 virus outside of the course and scope of employment, the employee must take sick leave. If the employee is diagnosed with COVID-19 and is quarantined they will qualify for the Illness benefit under the directive first. The reasonable approach is to conserve the employee's right to sick leave as provided by the BCEA.



Employment Revival Guide: Alert Level 2 Regulations*...continued*

65. How does an employer ascertain whether an employee contracted COVID-19 in the workplace?

In order to establish whether COVID-19 was work-acquired, employers will look at the following factors: (i) risks that the workplace poses in relation to certain categories and exposure to a known source at the workplace, (ii) business travel to high risk areas, (iii) a reliable diagnosis and (iv) the chronological sequence between exposure at work and development of symptoms.

66. How are COVID-19 related benefits calculated in terms of COIDA?

The benefits an employee may be entitled to in terms of COIDA is based on the degree of impairment. The degree of impairment is based on medical complications as a result of COVID-19 permanent impairment will be determined 3 months after diagnosis when maximum medical improvement is reached.

Where an employee suffers temporary total disablement, payment will continue throughout the period of disablement as a result of Covid-19, but not exceeding 30 days.

Compensation will not be made for unconfirmed cases. In respect of self-isolation and self-quarantine, employers must follow the TERS directive. The Compensation Commissioner has a right to determine each case on its own merit. Medical aid will be provided in confirmed cases for a period of 30 days and longer if this will mitigate the extent of the disablement (at the discretion of the Compensation Fund).

Death benefits will be payable if the employee dies as a result of COVID-19 complications.

67. What are the documents that need to be submitted in order to claim in terms of COIDA on behalf of an employee who contracted COVID-19 in the workplace?

The following documents must be submitted when a claim is made in terms of COIDA:

- W.CL.1 form completed by the employer;
- W.CL.14 form;
- exposure and medical questionnaire;
- first medical report;
- exposure history;
- medial report on symptoms;
- progress medical report for each consultation;
- final medical report; or
- Affidavit by employee if employer cannot be reached or timeously complete the W.CL.1 form.

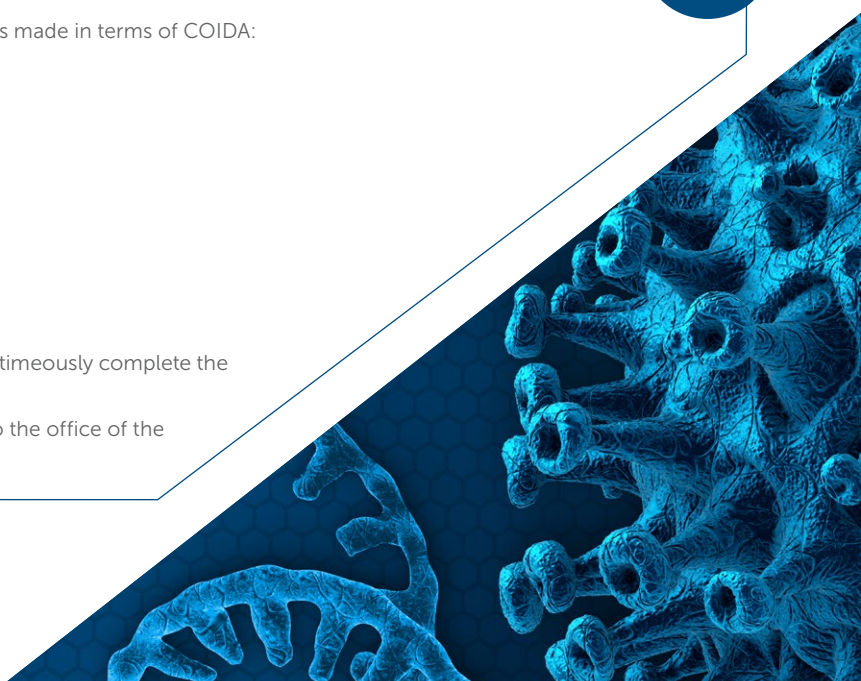
The above-mentioned documentation must be submitted to the office of the Compensation Commissioner for processing.

68. Does an employee accrue leave during the lockdown when the employee is not working?

Based on section 20(2) of the BCEA, employees can accrue leave during the lockdown period whether they work or not unless they accrue the leave on a daily basis (in other words per agreement of one day of leave for every 17 days worked).

69. Employees must take their annual leave within six months after the leave cycle. If their leave was scheduled during the lockdown, can it be cancelled and moved to another later date in the year even after the 18 month period?

When leave has been granted to an employee the employer cannot unilaterally cancel the leave. The leave may, by agreement, be rescheduled for a later time.



Employment Revival Guide: Alert Level 2 Regulations...*continued*

70. May an employer institute disciplinary proceedings during the lockdown? Can an employee who is working be dismissed for breaking lockdown rules if they are only meant to commute between home and work?

Yes, an employer may institute disciplinary proceedings. The normal principles apply as to misconduct committed outside working hours and away from the workplace. The penalty for breaking lockdown rules will depend upon the facts of the matter.

71. The employer has implemented a temporary layoff during the lockdown, but now certain employees are required to be available for certain duties. What is the obligation of employees if initially placed on temporary layoff?

When the employer can provide work the employees are obliged to render the services for which they must be paid.

72. Can an employer implement a temporary layoff after the lockdown?

Only by agreement. Therefore, in terms of a collective agreement or any other agreement that may be in place.

73. How does an employer, after the lockdown, obtain the agreement of employees for a temporary layoff or reduction in remuneration?

Through the protracted section 189 or 189A process as set out in the LRA. Employers are advised to take advice on the process before commencing any discussions.

74. Is there a different retrenchment process during the lockdown or National Disaster?

No. The procedure in section 189 or 189A of the LRA still applies. Employers may embark on a retrenchment process during the lockdown provided it is possible to meaningfully consult with the affected employees and a union if any.

75. Is it a fair reason to retrench employees after the lockdown because the employer realised that it can do better business by employing technology?

Yes, provided the employer can show that this is so and follows a fair procedure.

76. What happens when the probation period of an employee comes to an end during the lockdown period and the employee is not working?

It is fair to extend the probationary period. The extension depends upon the facts.

77. Where an employer suffers irreparable financial distress as a result of the partial or complete closure of their business operations as a result of COVID-19 and would therefore have to embark on retrenchments, may an employer rely on supervening impossibility of performance to automatically terminate contracts of employments with employees?

Contracts of employment will only terminate by operation of law owing to supervening impossibility where the impossibility is absolute. The lockdown has not created an absolute impossibility but rather a temporary impossibility as restrictions are temporary and based on the circumstances. Employers would therefore be required to follow the procedure set out in section 189 of the LRA in order to retrench employees.

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 transitionary regulations. Please note that the regulations that forms the subject of this guideline are no longer on force and this guideline is therefore only relevant for reference purposes.

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.

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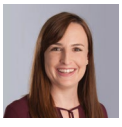

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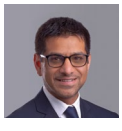

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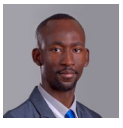

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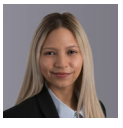

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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