



# COVID-19: EMPLOYMENT AND LABOUR RELATIONS



April 2020

## Introduction

The COVID-19 pandemic has both global health and economic implications. It has been predicted that the effect of COVID-19 pandemic on the global economy may be far worse than the 2008 Global Recession. The global shutdown of borders and restriction of movement by Governments around the world has impacted businesses, large and small.

In these unprecedented times, a lot of companies are considering cost-saving measures in order to stay afloat. Business supply and employee contracts are being reviewed and the inevitable layoffs are already being reported globally.

We have set out below, general guidance in response to some of the concerns of employers in Nigeria as they manage the impact of COVID-19.

**1. What obligation does an employer have towards the employee to curb the spread of the COVID-19?**

An employer has an obligation to provide and maintain a safe and healthy work environment for all employees and visitors. An employer has a duty to comply with all government public health directives especially in a pandemic such as this. Where for instance any employee tests positive to the virus or working conditions do not meet the rules issued by government to reduce the spread of the virus, an employer must take all necessary measures to ensure employee safety including compliance with government lockdown orders. A lot of businesses have now shutdown and the ones who can have their employees work remotely.

**2. Is an employer obligated to pay salaries where the employer is unable to provide work due to the impact of the pandemic or a lockdown?**

Generally, an employer has a duty to provide work to its employees and employees are entitled to their pay for work done, except the terms of the employment contract provide otherwise. Where an employer is unable to provide work or to pay the employees it must notify the employees and follow the terms of the employment contracts. A unilateral action by the employer contrary to the terms of the contract of employment may be treated as a breach of the employment contract.

For employees covered by the Labour Act (lower cadre employees who perform manual labour or clerical work), employees are entitled to wages only on the first day of the lockdown period where the employer is unable to provide work as a result of an emergency beyond the employer's control (which does not exceed one week or such longer period as an authorized labour officer may allow). The Labour Act does not envisage such a global pandemic which has now exceeded a week. Also, there has been no guidance issued by the Minister of Labour or other authorised labour officer as to how to treat employment contracts of Labour Act employees impacted by the COVID-19 pandemic. Our advice would be for each employer to keep employees

informed as to the challenges of the business at this time and the impacts on their contracts.

3. **Is it possible for the employer to temporarily reduce work hours and salaries/benefits as a result of the impact of the pandemic?**

Generally, an employer has a duty to provide work to its employees and employees are entitled to their pay for work done, except the terms of the employment contract provide otherwise. Where an employer is unable to provide work or to pay the employees it must notify the employees and follow the terms of the employment contracts. A unilateral action by the employer contrary to the terms of the contract of employment may be treated as a breach of the employment contract.

4. **Can the employer direct the employees to take their accumulated annual paid leave?**

This is an option available to employers as a cost saving measure to mitigate the impact of COVID-19. An employer can require employees to take accumulated leave during periods when an employer cannot provide work.

5. **Is it possible for the employer to direct the employees to proceed on an unpaid leave?**

This is another option available to employers to manage business risks arising from the pandemic. Engagement with employees is important so as to manage their expectations especially where the contracts of employment do not provide for unpaid leave and they are likely to receive no pay for the period of leave.

6. **Can an Employer terminate employment contracts as a result of the impact of the pandemic on its business?**

In Nigeria, an employer is entitled to terminate an employment contract for any reason or no reason at all. Neither party to the employment contract can be forced to remain in an employment relationship. The National Industrial Court of Nigeria has issued some decisions that suggest that termination of an employment contract without stating a reason is contrary to international best practices and constitutes unfair labour practice. The impact of the COVID-19 pandemic should be a justifiable reason for layoffs or termination of contracts of employment.

7. **What is an employer required to do to effectively terminate the employment?**

The employer must follow the terms of the contracts of employment to effectively terminate the contract. If the actions taken to manage the pandemic will impact on contract terms these must be notified to employees. We expect that some small employers may not be able to give the usual notice of employment or pay in lieu and all such impacts must be notified to the employees in writing. Employment contracts cannot be unilaterally amended and terminations may result in financial implications for employers i.e. payment of terminal benefits.

8. **What is required of an employer where the option of redundancy is contemplated?**

Redundancy due to inability to provide work which leads to excess staffing is another option for dealing with the impact of the pandemic. The Labour Act provisions on redundancy are now market standards for implementing redundancies and these include:

- a. inform the employees of the proposed redundancies, the reasons and the impacted positions;
- b. subject to skills levels and business needs, the principle of "last in, first out" should apply;
- c. terminate the employment contracts of affected employees in accordance with their respective terms;
- d. make any payment due to the affected employees subject to their contracts of employment; collective bargaining agreements may also stipulate redundancy payments and
- e. it is crucial to inform the trade union or workers' representative union (for unionised staff) of the planned redundancies before implementing same.

9. **What is the place of temporary layoffs/suspension of contracts under Nigerian Law?**

Temporary layoff or furlough as it is called in some jurisdictions is not defined under Nigerian law. It is a short-term suspension of employment contracts. Again, we advise employee engagement; the terms of a lay off or suspension of contracts must be explained to the employees. It is important to manage employee expectations and any extensions of initial suspension periods must also be notified. Where a suspension leads to terminations, the termination process must comply with the terms of the employment contracts.

10. **As a cost reduction measure, can a company explore an early retirement of its employees?**

Early retirement is also an option for cost reduction if an employer can afford the cost implications at this time. Retirement is either stated in the HR manual or the letter of employment. Employees who are close to the retirement age may be requested to proceed on an early retirement. Early retirement is usually a negotiated process with benefits payable to the employee. Where there are union employees involved the CBA terms and unions may be involved. This is a good option for managing post COVID-19 long term impacts on a business.

11. **Can an employment contract be frustrated?**

Like every other contract, an employment contract is capable of being frustrated. Frustration occurs wherever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because performance is impossible. The threshold of proof is high, and it is likely that frustration of contracts (not just employment contracts) will be litigated for years



after the pandemic has ended as the courts are usually the final arbiter of whether or not a contract has been frustrated. The following events can result in frustration:

- a. where the subject matter of the contract has been destroyed or is no longer available;
- b. death or incapacity of a party to a contract;
- c. where the contract has become illegal to perform as a result of new legislation;
- d. where there is an outbreak of war;
- e. e. where the commercial purpose of the contract has failed.

## 12. What are the obligations of the employer in the event of insolvency?

It is not impossible that insolvencies will result from the impact of the pandemic on the global economy. Salaries and benefits are classified as preferential payments under Nigerian law. These priority payments include PAYE, social insurance/pensions, salaries, vacation pay and employee compensation contributions and they take precedent over other debts of the employer.

## 13. Does an employer in the oil and gas industry require the approval of the Minister of Petroleum to bring a worker's employment to an end?

Yes. Going by the Guidelines for the Release of Staff in Oil and Gas Industry 2019, issued by the Department of Petroleum Resources ("DPR"), an approval from the Minister of Petroleum is required where a company determines the contract of employment by involuntary retirement, dismissal, termination, redundancy or releases on medical grounds. The approval is made through the DPR. The Guidelines define a worker to mean any Nigerian national who is employed by the holder of an oil prospecting licence, oil mining lease or any other licence or permit issued under the Petroleum Act or under Regulations made thereunder. Failure to comply with the Guidelines renders the employer liable to a penalty not exceeding \$250,000.00 and in addition, any permit, licence or lease granted to that employer may be withdrawn or cancelled by the DPR.

Apart from the regulatory consents in the oil and gas sector, the sector is also unionised and the unions will need to be engaged if employers in the sector plan redundancies as a result of the impact of the COVID-19 pandemic.

## 14. Where an employee who is ordered to work from home as a result of the COVID 19 pandemic is involved in an accident in the course of his work, will he be entitled to compensation?

Employees are entitled to compensation for workplace Injuries in Nigeria. The Employees' Compensation Act (ECA) regulates the payment of compensation to employees for any injury or accident arising out of or in the course of the employment. Employers contribute 1% of their monthly Payroll or any other amount as assessed by the Board to the Nigeria Social Insurance Trust Fund ("the fund") which is managed by the Nigeria Social Insurance Trust Fund Management Board [the Board]

to cover work related injury accidents or deaths. The Fund also covers injury outside the normal workplace at a location authorised by the employer. Employees may be entitled to compensation for injury incurred in the course of a work-from-home arrangement. The ECA prohibits any arrangement which compels an employee to forego his right to compensation under the ECA.

**15. Will an Employer be exposed to legal action for wrongful termination of employment?**

An employer may be exposed to action for damages for wrongful termination where the process of disengagement does not accord with the terms of the contract of employment. In exercising the right to terminate, therefore, care must be taken to ensure full compliance with the terms and conditions of the contract of employment. Any deviation must be pre-notified to the affected employees and agreed by them.

**16. Employment Protection under the Emergency Economic Stimulus Bill 2020**

In order to encourage businesses to retain their workers, the Nigerian House of Representatives has introduced an Emergency Economic Stimulus Bill 2020 to provide relief on Corporate Tax Liability, Suspension of Import Duty on Selected Goods and Deferral of Residential Mortgage Obligations to the Federal Mortgage Bank of Nigeria to alleviate the financial burden in response to the economic downturn occasioned by the outbreak of COVID-19.

The Bill seeks to encourage businesses to retain their employees during the COVID - 19 pandemic particularly between 1 March, 2020 and 31 December 2020 by creating palliatives to organisations in order to alleviate the adverse effects of the pandemic on businesses. The Bill seeks to among others, give a 50% income tax rebate on the total amount paid or to be paid as PAYE Tax under the Personal Income Tax Act to organisations. Employers will still be entitled to the rebate where the employee dies of natural causes, where the employee leaves the employment or has indicated interest to leave the employment before 1 March 2020 or where the employee breaches the Labour Act.

The Bill specifically excludes Upstream Petroleum companies subject to the Petroleum Profit Tax Act from its provisions and no reason has been given for this exclusion.

We are available to provide further insights if required. Our offices remain available remotely to provide support during these unprecedented and difficult times.

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