

IMPACT OF COVID- 19 ON EMPLOYMENT IN KENYA: ISSUES FOR CONSIDERATION

Following the declaration by the World Health Organization (WHO) of COVID-19 as a global pandemic and the reported first case of a COVID-19 patient in Kenya, President Uhuru Kenyatta on 15th March 2019 issued several directives. Amongst them, a call to employers encouraging them to allow employees, where possible, to work from home with the exception of employees working in critical and essential services.

This particular directive, together with the WHO recommendation to persons likely to contact the virus to self-quarantine for at least 14 days has caused great concerns amongst employers and employees. Some employers in adherence to the directive and as a legislative preventative measure under the Occupational Health and Safety Act, have sent their employees home indefinitely. This has prompted us to articulate various legal concerns that emanate from implications of the directive on employment contracts, as enumerated in the various labour laws. These include:

- a) Sick leave days;
- b) Paid leave;
- c) Unpaid leave;
- d) Reduction of salaries or wages; and
- e) Redundancies.

A. PAID SICK LEAVE DAYS

The Regulation of Wages (General) Order entitles an employee to sick leave of 30 days on full pay and a further sick leave of 15 days on half pay per year. If an employee has to be away from work because he/she has contracted the virus and is seeking treatment, then the sick leave provisions would apply to them. Similarly, if an employee has to self-quarantine for 14 days because he/she has recently returned from a trip abroad or was exposed to someone who had the virus then the sick leave provisions would apply. This is so even though the employee is not actually sick but because their absence from work is due to a health directive issued by the government.

B. PAID LEAVE

The Employment Act provides that the employee may take his/her annual leave at the convenience of the employer. This connotes a requirement of consultation between the parties and may be a practical step to take especially if the nature of the work cannot be done remotely from home. Employees are likely to understand that with so many days away from work the business may not afford to let them be away later on in the year.

C. UNPAID LEAVE

The Act entitles an employee to an annual leave of 21 days with full pay. It does not provide for unpaid leave and therefore if an employer was considering exercising this option, it would have to seek the employees consent. It

would be best to obtain the consent in writing to prevent a future claim for unpaid wages or salary.

D. REDUCED SALARIES/WAGES

An employer may agree with an employee to reduce their salary or wages to help the business cope with reduced cash flow. If the employee consents to the reduction it is advisable that the agreement be captured in writing. The employer may then offer to return the salary to its original position at such time as the business stabilizes again. The portion of wages that may be slashed will not be a debt to the employer unless this is expressly agreed since it would be a revised employment contract. The employer may choose to repay the slashed wages as a bonus at such time as the business is able to afford to do so. It would be a discretionary payment rather than a debt in the employer's books.

E. REDUNDANCY

This is a measure that certain employers might undertake if the corona virus pandemic escalates for a longer period. Redundancy, as defined by the Employment Act, refers to loss of employment by involuntary means through no fault of an employee and involves termination of positions by an employer because the requirement to carry out work of a particular kind has ceased or diminished or is likely to cease or diminish. For example, if a hotel had 14 waiters and due to the government directive restricting the hotel to provide only "take away services", meaning that in that period of time they only require 4 waiters, the employer may declare 10 positions redundant. The employer however must be able to show that there is no other role or position that the employee could perform. Where an employer resorts to declaring certain positions redundant, he/she must follow the procedural and substantive legal steps outlined by the Employment Act.

CONCLUSION

It is important to note that employees working from home are entitled to pay as the only interference encountered is change of the physical working place. Therefore, any change to the contractual terms including payment of salaries and wages ought to be undertaken with consultation as discussed in this brief.

For any further information please write to:



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