

EMPLOYER CONSIDERATIONS IN RESPECT OF COVID 19

What is the duty of care owed by an employer in respect of COVID 19?

The Occupational Safety and Health Advisory on Corona Virus (COVID-19) dated 14th March 2020 by the Directorate of Occupational Safety & Health Services (DOSH Advisory 2020, click [here](#) for the advisory) requires the employer to promote and practice hygiene measures such as provide clean and well-maintained hand washing facilities, offer alcohol-based sanitizers when regular facilities are not available, regular cleaning of objects that are frequently touched, make sure ventilation systems are working properly, limit all forms of employee gatherings among others.

How is an employer to treat self-isolation? Does this qualify to be treated as sick leave/ unpaid leave/compassionate leave?

The Employment Act does not define self-isolation and there is no guidance in this regard under the Act. However, in view of the fact that WHO has declared the COVID 19 as a pandemic and self-isolation is critical as a preventive measure pursuant to GOK directives, an employer should consider dealing with this period as paid compassionate leave. It would be important to have a doctor's note in this regard or evidence that the employee has recently travelled from a high-risk area.

What is the general sick leave provisions under the law?

Under the Regulation of Wages (General Order), for the first thirty (30) days of sick leave, an employee is entitled to full pay. Thereafter, the employee is entitled to a maximum of fifteen (15) days sick leave with half pay.

What are the options for an employer, if the employee exhausts their sick leave entitlement?

Employers and employees can negotiate a variation of the employment contracts in accordance with Section 10 (5) of the Employment Act, to either provide for a reduction of salary or continued payment of salary during the sick leave period. In these circumstances, compassion is called for on the part of employers. In a worst case scenario, an employer would need to consider separation based on the Employment Act.

Can an employer require staff to work from home and are employees entitled to their dues in this period?

Pursuant to the GOK directives, GOK has recommended that where possible, employees are directed to work from home. Employees working from home (tele-working) are entitled to their pay during this period.



Kaplan & Stratton



In addition to this, the Occupational Safety and Health Advisory on Corona Virus (COVID-19) requires that employers promote home stay policies for their employees or to work flexible hours to avoid peak public transportation times or crowding at the workplace.

[Can an employer conduct voluntary or mandatory screening?](#)

As far as we are aware mandatory screening can only be carried out by GOK. Previously, the Employment Court has held in respect of mandatory HIV testing and the release of the test results, that the said action was in breach of an employee's right to privacy. Consequently, unless the Employment Act is amended, mandatory screening for COVID 19 by an employer would be in breach of an employee's right to privacy. In terms of voluntary screening, as long as the employee consents to the release of the test results to the employer, the same would not be in breach of an employee's rights to privacy. However, the disclosure of the results to any third party should only be undertaken after consent has been obtained.

[Should an employer allow requests for staff absence where a family member has COVID -19 and if so, on what basis?](#)

An employer can grant leave to an employee to look after a sick member of the family. The employee would be entitled to take compassionate leave and their annual leave entitlement. The DOSH Advisory 2020 requires work places to adopt policies that outline specific requirements when sick staff may be absent to attend hospitals and staff who are not sick may need to be absent to care for others, especially family members.

[Is remuneration required in the event of voluntary absence?](#)

Where the employee is not considered to be on leave, payment is required for temporary

voluntary absences since the current absences are from GOK directives and not as a result of the employee's actions.

[Are employees who have been requested to stay at home \(but who cannot effectively work at home\) be deemed to be on leave?](#)

An employer has the right to request an employee to take their leave. However, the employer would need to notify the employee in advance that the absence from work will be deemed as leave.

[Unpaid leave - what happens if an employee's leave entitlement is exhausted? What happens when an employee's absence is for a prolonged period and in addition, there is a significant reduction of the employer's income earning ability as is happening in countries like Italy?](#)

In this regard, the law of frustration would be applicable. The doctrine of frustration of a contract refers to the situation whereby a contract ceases to bind the parties if, through no fault of either of them, unforeseen circumstances beyond the control of the parties arise in which a contractual obligation becomes impossible of performance. This doctrine also applies to a contract of employment. Frustration discharges the parties from further liability under the contract. For its successful application, frustration should not be due the act of the party seeking to rely on it. The global pandemic Covid-19 together with subsequent directives from the Government of Kenya would amount to a frustrating event in respect of employment contracts.

For the doctrine of frustration to be successful, it is required that the event have some character of permanence. It is arguable that an employer would be discharged from paying salaries in circumstances where for a prolonged period the employer has not been in a position to carry out any income generating activities.

The additional question that would arise is whether the employer would then be required to make severance payments in these circumstances. It is arguable that as a result of frustration of employment contracts due to no fault of either the employers and employees (in this case COVID 19), there would be no requirement to make any severance payments. To mitigate against the effects of a prolonged shut down, it is imperative that employers and employees vary the terms of the contracts to provide for reduced pay. In addition, employers can in consultation with employees agree to unpaid leave where there is a prolonged period of closure of the business. This would be a viable option for those in the hospitality and airline business.



Peter Gachuhi
PGachuhi@kapstrat.com



Esther Kinyenje
EWK@kapstrat.com

[Will insurance companies meet the medical costs for treatments?](#)

Most insurance companies have indicated that they will meet the medical costs for the COVID 19 treatment. It is important to review the terms of the policies in this regard.



Cosima Wetende
CWetende@kapstrat.com

In respect of lost revenue and/or financial losses arising from COVID 19, insurance companies have indicated that such claims are not due because of exclusionary clauses in respect of pandemics.

[What next?](#)

There is an urgent need for the legislators to enact legislation to set out the extent of a business's obligations to pay employees' salaries where cash flow has been adversely affected by COVID 19. In addition, GOK needs to implement tax and other incentives to assist businesses in this period.

