

Coronavirus | What to know about your employment rights

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By Compiled by Allison Jeftha.

As the coronavirus spreads, employers and employees alike are faced with the question of what to do should employees fall ill, need to work from home, or be quarantined.

Labour law experts Aadil Patel and Anli Bezuidenhout of law firm Cliffe Dekker Hofmeyr took a look at some common questions.

When can an employee be dismissed due to the coronavirus?

In terms of Schedule 8: Code of Good Practice Dismissals, an employer must investigate the extent of the illness if the employee is temporarily unable to work. If the illness may result in a prolonged absence from work, alternatives to a dismissal must first be considered.

According to the experts, the factors to take into account in considering alternatives to dismissal include: the seriousness of the illness, the period of absence, the nature of the employee's job and whether a temporary replacement may be secured.

During this process, the ill employee should be given an opportunity to make recommendations as well.

Only once all these processes have been followed and no alternative to dismissal found, may an employer consider dismissal.

May employers consider retrenchments due to the impact of the coronavirus?

Section 189 of the Labour Relations Act 66 of 1995 applies if an employer contemplates dismissing one or more of its employees for reasons based on its operational requirements.

"Operational requirements" is defined as requirements based on the economic, technological, structural or similar needs of the employer.

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A retrenchment is as a result of no fault on the part of the employee. In the circumstances, it is not an opportunity for an employer to terminate the employment of ill employees.

At this point, the coronavirus is unlikely to trigger an operational need. The recommended period for recovery/isolation is 14 days – this in itself cannot trigger a need to retrench. However, should a large number of employees be infected, an operational need could possibly arise in future.

What can be done about employees who refuse to come to work?

Employees remain obligated to come to work, unless instructed otherwise by their employers. Employees who refuse to come to work must have a valid reason for their absence. The mere presence of the Coronavirus in South Africa does not constitute a valid reason to stay away from work.

Employees who stay away from work without a valid reason, may face disciplinary action. "We encourage employees to rather speak to their employers about their concerns before making a decision to stay at home, without authorisation," said Patel and Bezuidenhout.

Do employees have the right to work from home?

Employees do not have a right to work from home. Working from home may be considered by employers but should not be implemented by employees without the employer's consent. We encourage employees to rather speak to their employers about their concerns.

May employees be required to work from home?

Yes. Working from home may be permitted in the discretion of the employer. This is not always viable but could be considered in a corporate environment.

Should employers consider this option, we recommend that clear guidelines be set for employees. This may include that the working environment must be safe, the employee must have a secure telephone line and Wi-Fi connection and employees should remain within travelling distance of the office.

May an employee's professional or personal travel plans be restricted?

Professional travel plans may be changed or prohibited. However, an employer does not have the right to dictate whether an employee may travel during his/her annual leave or weekends.

Employers may, however, require their employees to disclose if they have travelled to any specific locations in order for the employer to assess the risk to other employees or customers.

What is an employee's sick leave entitlement?

In terms of section 22 of the Basic Conditions of Employment Act 75 of 1997 (BCEA), the "sick leave cycle" means the period of 36 months' employment with the same employer immediately following an employee's commencement of employment.

During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks. Usually (for an employee who works five days a week) this equates to 30 days' sick leave per 36 months of employment.

What if sick leave is exhausted?

An employer is not required to pay employees for sick leave taken when the sick leave entitlement has been exhausted. However, we recommend that authorised unpaid leave be considered, said Patel and Bezuidenhout.

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In those instances, the employee must claim illness benefits in terms of the Unemployment Insurance Act 63 of 2001 (UIA). In terms of section 20 of the UIA, a contributor is entitled to the illness benefits contemplated in the UIA for any period of illness if, inter alia, the contributor is unable to perform work on account of illness.

Must an employee be paid for sick leave?

Subject to section 23 of the BCEA, an employer must pay an employee for sick leave: a) the wage the employee would ordinarily have received for work on that day; and b) on the employee's usual pay day.

When is an employer not required to pay sick leave?

In terms of section 23 of the BCEA, an employer is not required to pay an employee for sick leave if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

What are the basic requirements for a medical certificate?

The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council.

As an employer, what are my obligations?

The Occupational Health and Safety Act 85 of 1993 ("OHSA"), requires an employer to bring about and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of its employees.

For this reason, we recommend that employers adopt contingency plans and communicate with its employees regarding the measures it will adopt in securing the workplace.

This may include:

- the prohibition of handshakes or physical contact;
- limitation on meetings;
- sufficient supply of hand sanitiser; or

- requiring employees to work from home, should they feel sick in any way.

It may also be necessary to relax the sick leave policy or to permit more flexibility in working arrangements.

As an employee, what are my obligations?

The employee and the employer share the responsibility for health 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 the coronavirus.

Employees should also inform their employer if they are aware of any risk to the health of their colleagues.

*Compiled by Allison Jeftha.