

Payment of employees during the COVID-19 lockdown

30 March 2020

Introduction.

Business for SA (BSA), a grouping of BUSA and BBC dealing with COVID-19, represents the complete spectrum of businesses. These include:

- large, medium and small businesses
- businesses with different levels of labour intensity
- businesses with varying levels of financial reserves
- businesses with varying abilities to continue generating revenues during the lockdown, including depending on whether they provide essential services or are able to operate with staff working remotely, and whether their customers or clients are in a position to use and pay for their goods and services.

This means that different businesses have greatly varying levels of ability to continue paying employees during the lockdown, whether for all or part of the lockdown period; or on a part payment basis; or based at least in part on employees taking their annual leave during this period.

It is also the case that, should the lockdown period be extended beyond the currently planned 21 days, all businesses will find their financial situations increasingly stretched, in many cases to beyond breaking point.

It is therefore not possible for business or their representative organisations to take a single view on the question of payment to employees during the lockdown period.

Maximum possible generosity.

Employers are encouraged to be as generous as they reasonably can be in the current circumstances in respect of payment to employees. We also believe, however, that it is important to plan in a way that does not unduly destroy the ability of the business to survive, or to reopen, when public health circumstances make it possible to do so.

Consultative approach.

Employers are encouraged, in whatever approach they take, to engage in open and honest consultations with employees or their representatives over the approach to be taken, and where possible to hear employees' or their representatives' preferences about the



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approach to take, based on the business's financial capacity. Continued employee engagement is critical to the success of the approach that a business decides to take.

Possible approaches.

As we see it, there are a number of categories of businesses:

1. Employers and employees in essential industries, or those who carry out essential services for businesses that are carrying out zero or substantially reduced activities in order to be able to restart after the lockdown, and those who are able to work remotely from home.

In these cases, it is clear that the employer has a legal obligation to pay working employees for their work.

In these cases, where employees are working at their workplaces, it must be understood by the employer that the employer has a duty of care to working employees.*

2. Employers that are able and willing to pay for the time being. There are some sub-categories here:

- The employer that is able and willing to bear the full cost.
- The employer that is able now, or may become in the future, able and willing to pay a proportion of the employment cost. Some employers may be inclined to pay the equivalent of "short time" from the outset; others in this category may choose to undertake to pay in full initially but for a stated limited period of time.

3. Employers that, whether immediately or during the course of the lockdown, find that the only way it is feasible to continue paying is through employees using annual leave or taking unpaid leave. The BCEA gives employers the right to determine the timing of annual leave for employees where agreement is not reached. Taking annual leave is a mitigation measure because of the situation the business is in. To be clear, in this situation, it is not a choice between normal pay or annual leave. It is a choice between paid annual leave or unpaid leave.

4. Employers who must shut down operations because of the current lockdown, but who will restart operations as soon as the lockdown is lifted, and place employees on unpaid leave. In this case employers may be able to access the C19 TERS benefit. (Members are advised to wait before submitting claims for the COVID 19 TERS benefit, as the finalisation of the benefit and the claims mechanism may be subject to further change)s.



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5. And unfortunately there will be those businesses that, right now or at some state before the conclusion of the lockdown, the owners of the business determine that there is no choice but to close the business.

In this case, it will be necessary for the business to initiate section 189 proceedings and be ready to pay severance payments. Employees may have access to the normal unemployment benefits from the UIF.

It should be noted that there remains some lack of clarity on the COVID-19 TERS. As a further reminder, members are advised to wait before submitting claims for the COVID 19 TERS benefit, as the finalisation of the benefit and the claims mechanism may be subject to further changes.

Conclusion

To repeat, BSA advocates that members adopt the most generous approach to employees as is feasible. But it is also fully understood that there are real and genuine constraints on many businesses to pay employees in full for any length of time. We trust that, through consultation with employees or their representatives, business, labour and government can reach a clear understanding on how far steps can be taken to minimise the negative impacts of the lockdown on employees while also taking into account the need for post-lockdown business continuity or, to put it another way, to ensure that individual businesses and the economy as a whole is able optimally to restart and rebuild when normality begins to return.

***Duty of care:**

In terms of the Occupational Health and Safety Act, every employer has the duty to ensure a safe and healthy work environment. The employer must take all reasonably practicable steps to ensure such a safe work environment. During the lockdown, in respect of essential service companies, there is probably a heightened duty of care. Ideally, additional access control measures (such as temperature tests and strict access control) may be necessary. There is also a duty on employees to ensure that their conduct does not expose others to harm. Employees would accordingly be required to obey the reasonable instructions of employers pertaining to ensuring a safe working environment. On this basis, employees may also be required to disclose any event that might give rise to a reasonable apprehension of harm, such as contact with a person who tested positive for Covid-19, running a fever or displaying other flu-like symptoms.