

Q&A - pressing issues employers are addressing in light of the coronavirus outbreak

Johan Botes, partner and head of the Employment & Compensation Practice at Baker McKenzie Johannesburg, addresses a series of questions many South African employees and employers are asking amid the coronavirus (Covid-19) outbreak...

 By [Johan Botes](#) 19 Mar 2020



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Are employees obliged to disclose themselves as a "risk-factor" to the employer?

South African law does not place an obligation on employees to disclose their medical information or status. However, an employer has an obligation to provide a safe working environment. Monitoring those who attend the workplace, and whether they pose a risk to other employees, falls within the general employer duty to provide a safe workplace. Given the circumstances around the coronavirus, if an employer instructs their employees to inform the employer if they are at risk, then the employee will be obliged to disclose this to their employer. If the employee fails to comply, it may be possible that the employee can be held liable for misconduct. However, this will depend on the circumstances of each case.

Can employees refuse to come to work or travel?

Generally, no. However, as a legal principle, employees may refuse to come to work if there is a reasonable risk on their life or health which is not in line with the inherent requirements of their roles. For example, a police officer cannot refuse to engage in dangerous work where this is inherent to the job. In relation to the coronavirus, an employee may potentially refuse to come to work if the objective facts suggest a strong likelihood of being infected, for instance where:

- i. there is a confirmed infection in the workplace and
- ii. if the employee's place of work is in close proximity to where the infected employee was located (i.e. same open space office),
- iii. the employer cannot reassign the employee to a no-risk environment at the workplace.

However, employees should avoid unreasonably or prematurely refusing to come to work as this may result in the termination of their employment should the objective facts not support their refusal. Employees should engage with their employer and discuss concerns before taking drastic steps such as refusing to tender their service.

Can the employer send employees home to work?

The employer may have a contractual right to ask employees to work from home or not to attend work at a point during their employment. This will depend on the wording of the employment contracts. If the employer does not have a contractual right, given the employer's obligation to provide a safe working environment, it may be reasonable to instruct employees to work from home if they can do their job remotely and if not, to ask them not to attend work.

However, as employees have a right to fair labour practices, an employer must consider whether the instruction to work from home may affect other rights or benefits and, if so, what reasonable accommodation the employer could make to limit the potential prejudice to staff. In the context of the health pandemic presented by the Covid-19, in most instances an employer would be entitled to instruct staff to work from home where the employees are able to WFH, without such an instruction constituting unfair conduct.

When is the employer forced to shut down its operations?

The law does not set a threshold for when operations must be shut down. In the circumstances surrounding the coronavirus, it is advisable to shut down operations if continued operations would pose a significant risk to the health and life of the workforce. Where a workplace has to close temporarily and this will impact on staff remuneration, the employer should ideally reach agreement with employees on how and when their remuneration will be reduced as a result of the temporary closure. Employers may instruct staff to utilise their annual leave for the purpose of the temporary closure, and may also reach agreement with employees on measures such as unpaid leave, job rotation, working shorter hours or other measures aimed at reducing the impact of the pandemic on the workplace.

Does the employer have the obligation to report infections occurring in the business to the health authorities?

No, only medical staff and doctors who become aware of an infection are required to report to the health authorities.

Can the employer require an employee to see a doctor?

Yes. Medical testing is prohibited, unless *inter alia* it is justifiable in the light of the medical facts. The Covid-19 endemic should meet this test. Employers may require staff to produce a medical certificate confirming that the employee does not have the coronavirus and that the employee is fit to work.

If kindergartens and schools are being closed and employees need to stay home and cannot work, does the employer need to pay them and - if so - for how long?

If the employee just needs to stay from home, and not work in order to look after a child, then the employee would have to apply for annual leave or enter into an alternative arrangement with the employer. The annual leave period will depend on the terms of employment (annual leave is granted at the employer's discretion).

However, if the employee needs to stay home and cannot work because they need to take care of an ill child, the employee is entitled to paid family responsibility leave (three days per annual leave cycle).

ABOUT JOHAN BOTES

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