

# Guide to employers' tax obligations after damage to their premises

The recent looting and damage to businesses in KwaZulu-Natal and Gauteng has had a devastating impact on many businesses, both small and large. In some cases, the damage is so severe that the business cannot continue to produce or sell, and valuable data may have been lost, including employee and tax records.

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Source: Tomasz Pacyna – [123RF.com](https://123RF.com)

In this article, we deal with some of the possible implications for affected employers and employees.

## No money for payroll

If an employer's premises are so severely damaged that employees cannot work and there is no work from home alternative, the "no work no pay" principle with no accrual of benefits would likely apply, as the employer is not able to perform in terms of the employment contract due to supervening impossibility.

Where employers are severely cash constrained, they may not be able to pay their employees at all. Ideally, the employer and employee consult and agree to a temporary lay-off while the business is rebuilt. The employees may receive no or minimal remuneration during this period. In this case, employees would qualify to receive reduced work time (RWT) benefits from the Unemployment Insurance Fund (UIF).

The UIF recently enabled a bulk application process for Covid-19 affected employers to apply for the RWT benefits for their employees. RWT benefits will be paid by the UIF directly to the employees. These payments are conditional on the employees being contributors to the UIF and having sufficient UIF credits and on employers being up-to-date with their UIF compliance obligations, including the submission of monthly reports to the UIF.

There are industry discussions to provide for the normal RWT benefit to be calculated in the same manner as the RWT benefit is calculated in the Covid-19 Temporary Employer / Employee Relief Scheme (Ters) directive. This is more beneficial as it provides for an employee to be paid the full value calculated in terms of the formula in the Unemployment Insurance Act. Any amount paid by the employer to top up the payment will not reduce the benefit calculated in terms of the formula as long as, in total, employees do not receive more than their normal remuneration. These discussions further hope to provide for an efficient process for employers with destroyed businesses to apply for relief for their employees as well.

## **Impossibility of meeting tax deadlines**

The employer's EMP 201 for a month and payroll taxes are usually due by the 7th of the following month. Late payments of payroll taxes after the due dates result in a 10% late payment penalty and interest calculated from the 1st of the following month at the current rate of 7% per annum.

In President Cyril Ramaphosa's Address to the Nation on Sunday 25 July 2021, he announced the deferral of "PAYE taxes" for three months to provide businesses with additional cash flow, and an automatic deferral of 35% of "PAYE liabilities" for employers with revenue below R100 million. The employment tax incentive (ETI) would also be expanded to include any employees earning below R6,500 and the incentive amount would be increased by up to R750 a month.

National Treasury in the media briefing on 28 July 2021 has confirmed that the deferral of the PAYE liabilities and ETI amendments will be from 1 August 2021 for four months. A more detailed note on all the tax relief will be published.

Employers who are still unable to meet their payment obligations after the four months of relief should apply to Sars for deferral of these obligations or a compromise / waiver of tax debts, to avoid collection measures. Those collection measures could include debiting the taxpayer's bank account for the amounts due. The Sars website contains [email addresses](#) for the various regions which taxpayers can approach to apply for deferral of payment obligations.

Where the 10% late payment penalty has been triggered, it may be possible for the employer to justify the late payment on the basis of exceptional circumstances. The Tax Administration Act provides for Sars to remit the late payment penalty if Sars is satisfied that one of the following exceptional circumstances prevented the taxpayer from complying with its payment obligations:

1. human-made disaster;
2. civil disturbance or disruption in services;
3. serious emotional or mental distress;
4. serious financial hardship in the case of a business, which is an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised;
5. any other circumstance of similar severity.

In our view, the violence, looting and destruction of an employer's business should fall within one of the exceptional circumstances above. In applying for the deferral or write-off of tax obligations, the employer should submit supporting documents such as photos, insurance or police reports, and bank statements to Sars demonstrating the direct link between these circumstances and the late payment.

Interest can also be remitted on the basis of circumstances beyond the taxpayer's control, and these

circumstances are limited to:

1. a natural or human-made disaster;
2. a civil disturbance or disruption in services; or
3. a serious illness or accident.

Sars is likely to adopt a case-by-case consideration of whether to remit the penalties and interest and we hope that SARS will adopt a sympathetic approach.

## **No machines to submit payroll returns**

As Sars officials work remotely and various compliance services are available online, such as eFiling, easyfile, online self-help services, and Sars's Mobi App, we believe it is unlikely that Sars will accept the destruction of an employer's computers as the sole reason for non-or late compliance of payroll obligation

Some employers would already be using an external payroll provider or a laptop at home, which was not affected by the damage at the business premises.

Sars is also unlikely to accept the destruction of records as a reason for non-compliance with tax obligation and inability to discharge the onus of proof. However, cloud backup is readily and efficiently available.

If the employer's records and computers are destroyed and the employer has no off-site or cloud backup, then it may not be in a position to issue IRP 5 certificates to employees for the 2021 year of assessment, for which the filing season recently opened. Sars is unlikely to accept damage of computers as the sole reason for non-compliance. The employer should possibly reconstruct the payroll using best estimates and submit the IRP 5 for the 2021 year of assessment. This is to prevent the employees having to submit their ITR12 tax returns without Sars having records that the PAYE had been withheld and paid to Sars for them.

## **Business closures**

Unfortunately, some employers who were already on their last cash reserves before the destruction of the businesses will be unable to recover without government support. These employers should commence the section 189 or 189A of the Labour Relations Act retrenchment process. If it is necessary to retrench their employees, any statutory payment as a result of termination of employment (excluding notice and leave pay) would qualify as a severance benefit.

Employees that have not made a lump sum retirement withdrawal or not previously received severance benefits will be able to take up to R500,000 as exempt from income tax. The employer would need to apply for a directive before making the severance payment.

## **ABOUT THE AUTHOR**

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