

GEPLAW

COVID-19 Special Edition



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COVID-19 AND ITS IMPLICATIONS ON EMPLOYMENT CONTRACTS



INTRODUCTION

Coronavirus Disease (Covid-19) has disrupted virtually all facets of life, including workplace relationships and productivity. Many countries have some form of restriction(s) on gathering in public spaces to stymie the spread of the virus. Some countries are on total lockdown resulting in offices being closed, and staff working remotely. In Lagos, Ogun and the FCT, organisations providing non-essential services are prohibited from operating from their office spaces, and where feasible, required to run operations from remote locations. This disruption of traditional workflow has raised legal questions affecting the viability of employment contracts/relationships.

Law Applicable to Employment Relationships

The applicable law for labour and employment related legal inquiries is the Labour Act CAP L1 LFN 2004 ("the Act"). The Act specifically defines the scope of application and it applies to "workers" as defined under Section 91 of the Act:

"any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour, but does not include-

- (a) Any person employed otherwise than for the purposes of the employer's business, or
- (b) Persons exercising administrative, executive, technical or professional functions as public officers or otherwise, or
- (c) Members of the employer's family, or
- (d) Representatives, agents and commercial travellers in so far as their work is carried on outside the permanent workplace of the employer's establishment; or
- (e) Any person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the articles or the material; or
- (f) Any person employed in a vessel or aircraft to which the laws regulating merchant shipping or civil aviation apply".



LEGAL ISSUES FOR CONSIDERATION

1. What are the likely labour and employment issues and long-term effects arising from the lockdown/ work interruptions due to Covid-19?

- o Disruption of workflow
- o Under-performance by employees for varied reasons
- o Reduction and stoppage of revenue flow for the organisation
- o Salary and pay cuts
- o Terminations
- o Redundancy of employees
- o Organisational restructuring

2. What are the obligations of employers and employees towards the survival of the organisation during the lockdown?

In determining the obligations of employers and employees, certain inquiries should be taken into consideration:

- o What is the nature of the job?
- o Does change in workspace influence employee output?
- o Are the employees' tasks tied to the workspace?
- o Do the employees have access to the tools to carry out tasks remotely?
- o What reasonable adjustments have the employer made to ensure the continuity of work remotely?

Generally, where the nature of the job permits working remotely, the employee is obligated to deliver on tasks to ensure a steady flow of revenue during the lockdown period. On the other hand, an employer is obligated to provide the necessary tools for the employee to carry out his duties remotely. Furthermore, to ensure productivity, employers should set specific, measurable, assignable, realistic and time related goals so output and productivity can be determined during the period of remote working.

3. Can an employer suspend the payment of salaries or reduce salaries because of inability to generate income due to the pandemic?

Section 5(1) of the Act provides that no employer shall make any deductions or make any arrangement with a worker for any deduction from the entitlements to be paid to the employer without prior consent of the employee, neither can any employer unilaterally deviate from the salary agreed to be paid in the contract of employment. Consequently, an employer cannot unilaterally suspend payment of salary or reduce salaries because of inability to generate income during the pandemic.

4. Can an employer mandate an employee to proceed on paid/unpaid leave in view of compulsory stay at home period?

Section 18(1) of the Act provides that every employee shall be entitled to a holiday of at least six working days with full pay after twelve months of continuous service. The decision to convert the lockdown period into annual leave is at the employer's discretion, however such decision must be communicated with employees. Furthermore, where an employer mandates its employees to proceed on annual leave, such employees cannot be forced to deliver tasks as this violates fair labour practice.

5. Can a contract of employment be terminated where the employee is unable to deliver on tasks because the employer fails to provide tools to work remotely?

An employer is generally obligated to provide tools to ensure the employee can work remotely and make reasonable accommodations for the employees, where working remotely is feasible. An employee is within his rights to request tools to enable working remotely. Consequently, termination of employment because of the employer's

because of the employer's inability to provide appropriate tools for the employee to work remotely would amount to breach of contract, if raised as a defense.

6. Can an employer terminate an employment contract because of the impracticability of the employee to do work or earn a salary?

Generally, at common law, an employer is at liberty to terminate employment provided that the termination follows the procedure stated in the contract of employment. Nonetheless, a contract of employment can be susceptible to termination because of frustration where there are occurrences beyond the control of both parties, such as a pandemic lasting for an extended period, making it impractical for the contract to subsist. This however depends greatly on the nature of work and the duration of disruption caused by the pandemic. It is advisable that in the event of termination due to impracticality/frustration of purpose, the notice of termination should state that the reason for termination, to avoid claims of unfair labour practices.

Nevertheless, whether an employer can terminate employment because of impracticability, depends on the steps taken by the employer to make reasonable adjustments to ensure continued existence of the contract of employment. Essentially, employers must consider alternatives before terminating employment, and termination should be the last resort.

7. Can a company suspend the onboarding of new hires whose resumption dates falls within the lockdown?

Nigerian Courts have held that the resumption date for new hires forms part of terms of contract of employment and is

binding even before signing. Thus, a new hire has rights prior to the start of the employment or resumption at the business office, and those rights should not be unilaterally abrogated by the employer. Where feasible, the onboarding process should carry on via virtual platforms. Where onboarding remotely is impractical, the employer should consult with the employee to renegotiate for a later start date, temporal wage reduction or termination of the contract if onboarding is not plausible for an extended period.

8. What happens if there is an extended work disruption/redundancy and how should employers handle employee redundancy?

Section 20(3) of the Act, defines redundancy as an “involuntary and permanent loss of employment caused by an excess of manpower”. Effectively, in a redundancy situation, the company has more staff than is necessary for the work available. To handle redundancy, an employer may consider some factors to determine whether to keep certain employees necessary such as, the ability to contribute to the growth of the business, expertise, competence, requisite skill, and capacity. Before triggering termination due to redundancy, the employer should use best efforts to negotiate a severance package for the redundant employee(s). It should also be noted that the Act requires that “the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy”.

9. Is an employer liable for injuries sustained by an employee in the course of working remotely during the lockdown period?

Generally, Section 73 of the Employee Compensation Act, 2010 provides for workers compensation to the employee for injuries sustained in the course of performing his

duties, and payment of the compensation can be subjugated by the employer where it participates in the NSITF contribution scheme. The Employment Compensation Act does not specify where the injury must occur; rather it states that the injury must be in the course of performing the employee's duties. However, the jurisprudence for the types of injuries to be covered by an employer whose staff are working remotely is not fully developed and it will be based on the unique nature of the incidents leading to the injury and whether it was foreseeable that such injuries would occur in the course of performing duties remotely. Additionally, it is worth considering how an employer can ensure safety in its employees' homes during the lockdown period.

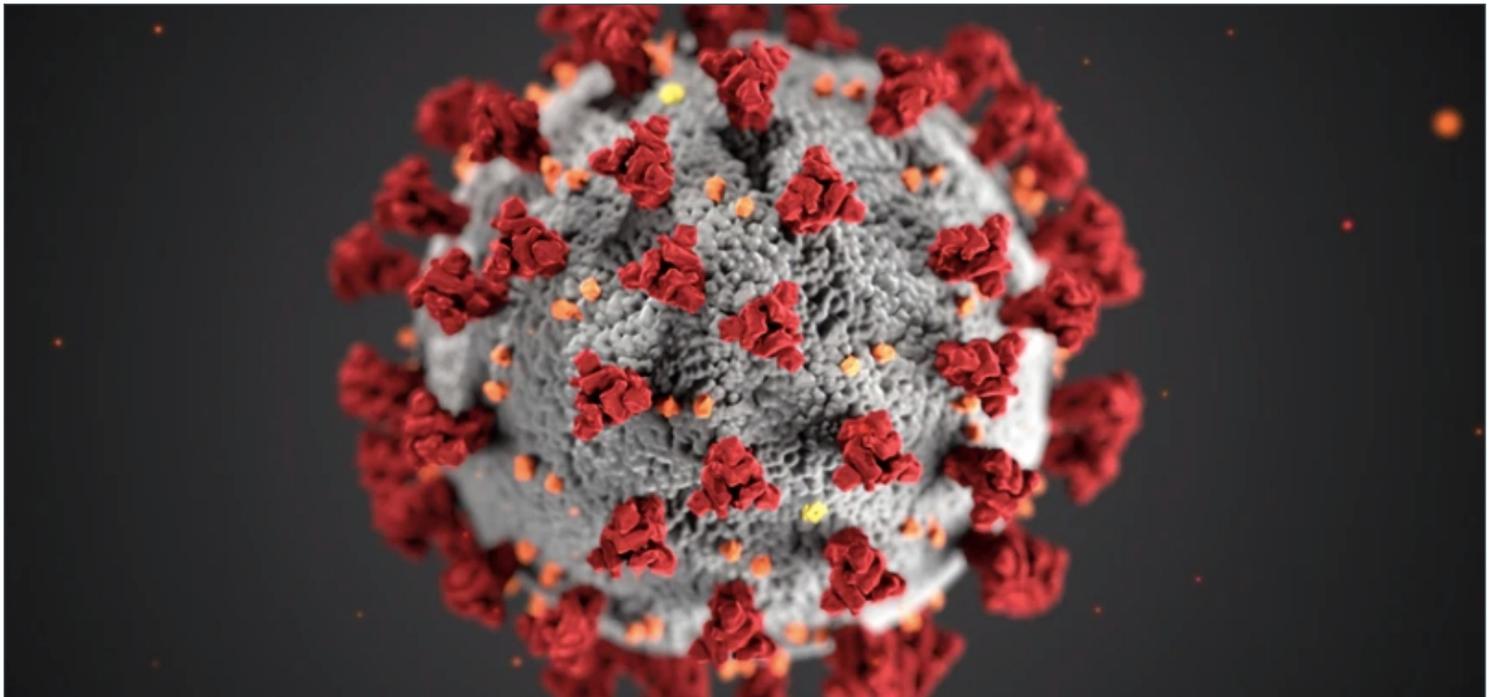
10. What should the employer do in situations where employees cannot work remotely?

Ideally, where an employee cannot work remotely, the employer should open the

channels of dialogue to ensure the employee is carried along with the options for handling the situation. The employer should consider discussions on salary cuts, or benefits tradeoffs such as converting the lockdown period into annual leave, suspension of the employment contract or termination when all else fails. However, before any decision is taken, the employees must be carried along.

Conclusion

The Covid-19 pandemic will have drastic effects on the labour market which might require a re-evaluation of employment contracts, and in some cases, will cause loss of productivity, revenue, remuneration and employment. In all situations, the employees must be consulted and carried along with the decisions made by the employer, to avoid running afoul of the law or engaging in unfair labour practices, thereby rendering the organisation liable to penalty.



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