

COVID-19: The impact on employment in Nigeria (Q&A)

May 2020



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Introduction

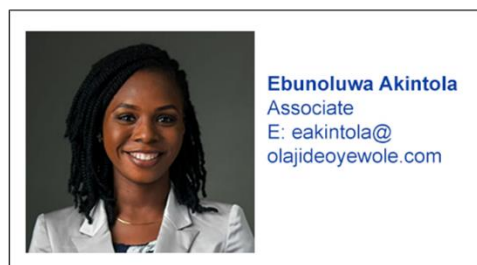
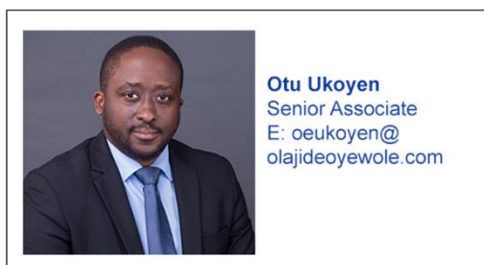
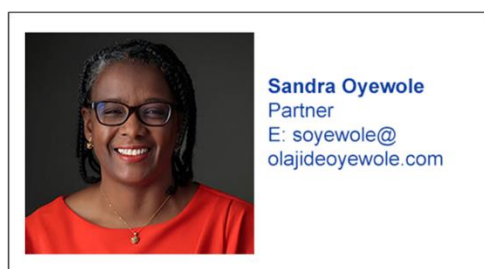
The COVID-19 pandemic and the measures imposed by governments to limit its spread have created a number of significant issues which are of grave concern to employers in Nigeria and beyond.

Since March 30, 2020, save for those that provide essential services, most businesses in Lagos State, Ogun State and the Federal Capital Territory have been closed as a result of the lockdown measures imposed by federal and state governments. Other states in the country have implemented full lockdown measures, closure of borders and or curfews. The impact of the lockdown on many businesses has been near catastrophic.

It is expected that in the near future, the lockdown measures will gradually relax, and economic activities will resume. Indeed, President Muhammadu Buhari, in his address to the nation on April 27, 2020, announced a phased lifting of the lockdown measures. Business continuity planning, employment matters, working during a pandemic and what is the “new norm” are uppermost in the minds of employers.

Our Employment practice has carefully considered the various issues arising and provides advice on these matters in a question and answer format in this document. The advice relates to the information, law, regulations and judgements available and in force as of May 7, 2020.

Authors



Q&A: COVID-19 impact on employment in Nigeria

What laws govern employment in Nigeria?

The Nigerian Labour Act, associated employment laws, regulations and policies,¹ contracts of employment, Human Resources (HR) policies or employee handbooks, judgments of the National Industrial Court of Nigeria, appellate and apex court, etc.

Who does the Labour Act apply to?

The Labour Act is federal legislation that applies to persons employed for manual labour such as janitors, bricklayers and guards and for clerical work like that of clerks and administrative assistants.

If the Labour Act does not apply, what governs the employment of such persons?

The persons exercising administrative, executive, technical or professional functions are governed strictly by the terms of their employment contracts, HR policies, handbook and court judgments.

Employment contracts

Do employment contracts usually provide for *force majeure* and extraordinary events such as pandemics?

It is not common practice in Nigeria to include force majeure, particularly in the context of pandemics and related events, in employment contracts. The COVID-19 pandemic is an unprecedented crisis.

What is force majeure?

It is a contractual clause that alters the obligations and liabilities of parties when an extraordinary event (such as pandemics, lockdowns, etc.) occurs, and prevents parties from fulfilling those obligations.

If the employment contract does not provide for *force majeure* or include particular terms, what are the options of the employer? Can the employment contract be revised?

Under the principles of contract, parties to an employment contract may negotiate, vary or revise the terms of the contract by mutual consent, either directly or through trade unions.

Given the situation with COVID-19, what new terms can be included in an employment contract?

Force majeure, extraordinary events, remote working,² furlough,³ suspension,⁴ frustration,⁵ redundancy and interim arrangements, compulsory leave, health and safety,⁶ and obligations of

¹ Contact oeukoyen@olajideoyewole.com for a copy of Olajide Oyewole LLP's overview of Nigeria's employment laws.

² Discussed on page 8

³ Discussed on page 11

⁴ Discussed on page 11

⁵ Discussed on page 12

⁶ Discussed on page 14

employees. These terms can be included in employment contracts, HR policies and staff handbooks. The revisions, mode of communication and acceptance by employees must be carefully considered.

Wages and salaries⁷

Can an employer reduce employees' salaries during or after the lockdown?

Subject to the exception under the Labour Act, employers are prohibited from deducting wages or entering into agreements with workers for wage deductions. Employees that are governed strictly by contract are entitled to full salaries subject to principles such as suspension and frustration.

Why is the consent of the employee required?

Mutually agreed terms for reduction of wages and salaries are not likely to be challenged. Consent that is obtained by fraud, coercion, etc., is likely to be challenged. An arbitrary reduction in wages and salaries will amount to breach and may constitute constructive dismissal.

If after the lockdown is lifted, an employee becomes is infected with COVID-19 in the course of work, what is the employer's obligation in relation to wages and salaries?

Under the Labour Act, a worker is entitled to wages up to 12 working days in any one calendar year during absence from work caused by temporary illness certified by a registered medical practitioner. For employees that are governed strictly by contract, the terms of employment establish the amount payable. Benefits may be increased at the discretion of the employer.

Obligations to provide work

Under the Labour Act, must employers provide work during the lockdown for workers and is there any liability if work is not provided?

Under the Labour Act, employers that fail to provide work must pay workers for each day that they failed to do so, except during circumstances beyond their control that last for a week. In such instances, workers will be entitled to wages on the first day of such period. The lockdown could constitute a circumstance beyond an employer's control.

Must an employer provide work during the lockdown for employees that are strictly governed by contract and what is its liability if it does not?

Employees that are governed strictly by contract are entitled to full salaries, unless otherwise agreed. Where possible and permitted by law, employers could arrange for employees to work during the lockdown. If this is not possible, the options discussed under wages/salaries, leave, suspension and termination will apply.

⁷ Wages are usually associated with employee compensation that is based on the number of hours worked multiplied by an hourly rate of pay. Salaries are associated with employee compensation quoted on an annual basis and payable on a monthly basis in arrears. The terminologies may be used interchangeably to refer broadly to remuneration of workers and employees.

What options are available to employers where employees refuse to work during or after the lockdown?

An employee that fails or refuses to work during the lockdown without any justifiable cause, despite arrangements made by the employer, will be liable for breach of the employment contract. The employer will be entitled to take disciplinary and other measures prescribed in the contract.

Remote working

Where is the workplace?

Most employment contracts provide that the workplace is the physical location of the business or any other place designated by the employer. During the lockdown, the place of residence of employees is deemed to be their workplace.

What is remote working?

This is an alternative to the traditional office work setting. Not all jobs allow for remote working.

Are employees expected to work remotely during the period of the lockdown?

Provided that tools for working remotely are in place, the employer requires the employee to work and work is available, employees that are able to work remotely during the lockdown are required to do so.

Can employers request employees to continue to work remotely after the lockdown?

Yes they can. If the employment contract does not give employers the discretion to designate a location where an employee should work, it will need to be revised.

What must be taken into consideration when employees work from home?

- a schedule that will best meet the needs of employees.
- the duties, expectations, deadlines and policies of the employer.
- regular catchups, conference calls and communications.
- confidentiality and security of the work being undertaken; and
- the presence of children at home which may affect work/life balance and productivity.

Is flexitime an option for employers after the lockdown?

Provisions regarding working hours and schedules are usually contained in employment contracts. Thus, employers can legally review working hours, shifts, etc., to reduce staff exposure to crowds at the workplace. Even if not provided for, employment contracts can be revised.

What should an employer consider in terms of securing its information technology?

- policies on use, maintenance and safe keeping should be established.
- confidentiality and non-disclosure obligations should be emphasized; and
- specific security measures should be deployed in line with applicable regulatory requirements.

Leave

Can employers mandate employees to go on compulsory leave during the lockdown?

Unless the employment contracts and or HR policies expressly provide for compulsory leave, mandating employees to proceed on leave, without their acceptance, will amount to a unilateral variation of their employment contracts and render such act voidable. Subject to the nature of the business, leave could be activated on terms that are mutually agreed.

Can employers mandate employees to go on unpaid leave during the lockdown?

The Labour Act prohibits wage deductions and agreements to deduct wages. Compelling workers covered by the Labour Act to go on unpaid leave could be construed as an implied reduction of wages and result in possible legal action. Compelling employees governed strictly by contract to go on unpaid leave can only be done if provided by the employment contracts, or the parties mutually agree.

As the lockdown comes to an end, can employers apply leave retrospectively?

Employers could designate leave retrospectively if provided for in the employment contract, leave policy or is mutually agreed. Subject to any case law or regulation that is made in the future, the employment contract may be revised to include such provision. If the revision is not accepted by the employee, he or she may elect to terminate the employment.

What can an employer do where an employee that did not work during the lockdown requests for leave after the lockdown when the existing workload is high?

For workers covered by the Labour Act, if the employment contract or leave policy (a) provides for deferral of leave or the parties mutually agree, leave may be deferred; and (b) does not provide for deferral, it can be revised. If the worker refuses to accept the revision, he or she could terminate the contract. For employees governed strictly by contract: (a) if the employment contract gives the employer the discretion to approve leave, leave may be deferred to a time that is convenient; (b) the employer may grant leave subject to conditions; or (c) if the employment contract does not contain a discretion to grant leave, it can be revised. If the employee refuses to accept, he or she may elect to terminate the contract.

Furlough, suspension and termination

What does furlough mean, and does it apply in Nigeria?

Furlough is a temporary leave of absence from work during government shutdowns. The term is not popular in Nigeria, but implications are similar to a suspension of an employment contract.

Can an employment contract be suspended?

An employer could rely on an existing contractual provision to temporarily suspend the employment where a supervening event occurs, provided that the event prevents (a) the employer from providing work; and/or (b) the employee from transporting himself or herself to the workplace or executing the work. If the employment contract does not provide for suspension, it cannot be suspended unless the parties mutually agree and if such action is taken, it will amount to a breach.

What does frustration of an employment contract mean?

A contract is frustrated when an event occurs that renders performance impossible, illegal, or radically different from what was originally contemplated by the parties. Events such as restriction on movement and commercial activities are capable of frustrating a contract. In any of these events, the parties will be discharged from further performance by operation of law. The Supreme Court has affirmed that frustration applies to all categories of contracts. Thus, employment contracts can be frustrated.

Can an employer terminate employment contracts due to frustration?

An employment contract can be frustrated where the supervening event destroys the fundamental assumptions of the relationship, e.g. the purpose of the employment, the obligations to provide work and/or to be available to work, etc. Frustration could constitute another exception to the obligation of employers to pay full salaries regardless of whether they are able to provide work. However, frustration within the context of COVID-19 has not been tested in court.

What is redundancy?

Redundancy is defined under the Labour Act as an involuntary and permanent loss of employment caused by surplus manpower. According to case law, redundancy occurs when the services of a worker or an employee, having been in continuous employment of an employer, are no longer required by the employer due to no fault of the worker or employee.

Can an employer terminate employment contracts due to redundancy?

The lockdown could constitute a basis for redundancy.⁸ Under the Labour Act, the principle of “last in, first out” should be applied in the discharge of affected workers, subject to merit, skill, ability and reliability. An employer should also negotiate with discharged employees, inform their representatives of the reasons for redundancy and pay benefits. For employees that are governed by contracts, the duty to pay and the quantum of payments are governed by the employment contracts. An employer could also make ex gratia payments.

Fixed-term employments

What steps should be taken in respect of fixed-term employments at this time?

A fixed-term employment is a contract wherein an employer hires an employee for a specific period. Such employments are governed by the same principles of contract that are applicable to other forms of employment. Therefore, changes may be made to the terms of such employment based on the unprecedented disruptions caused by COVID-19 and mutually agreed by the parties.

⁸ Redundancy means an involuntary and permanent loss of employment.

Expatriate employments

What steps should be taken in respect of expatriate employees at this time?

Expatriates' employments are governed by the same principles that apply to other employments. Many expatriates have returned to their home countries due to COVID-19. Subject to their job functions and arrangements with employers, those that are able to work remotely may do so. For those that are unable to work remotely, the terms of their contracts or arrangements with their employers will determine the steps to be taken. Due to the lockdown and travel restrictions, Nigerian visas and work permits were not issued and/or renewed. After the lockdown, the required permits will be issued. It is expected that a moratorium will be granted to expatriates that were unable to renew their permits due to the lockdown.

Occupational disease

What is occupational disease?

The Employee Compensation Act 2010 defines occupational disease as a disease that is contracted in the course of an employment or due to exposure to risk factors at work and includes viruses. A worker or employee who suffers disabling occupational diseases/death, arising out of or in the course of employment is entitled to compensation.

Is COVID-19 an occupational disease?

COVID-19 is a virus and constitutes an occupational disease under the Employee Compensation Act.

What is the employer's liability if it is claimed that an employee was infected with COVID-19 while in the workplace and or died as a result of the virus?

Provided a worker or employee contracted COVID-19 during work or at the workplace, and is disabled from earning full wages or salaries or dies, he or she or his or her representatives is entitled to compensation under the NSITF. The Act provides that compensation is in lieu of a right of action and this provision can be relied upon by an employer in the event of a legal action.

Health and safety

After the lockdown is lifted or phased out, will health and safety in the workplace as it relates to COVID-19 still be a factor to consider?

Yes.

Does the law require an employer to engage a health and safety officer?

No. However, it is advisable to either employ or assign an employee or a team to the role to keep the workplace safe. Employers should have oversight on the activities of the health and safety personnel.

When the lockdown measures are lifted and non-essential businesses are allowed to open, can an employer ask employees to provide personal, medical, travel and other related data?

Subject to Nigeria's data protection laws, yes. To limit risk to all employees and visitors, the employer can request that employees provide this information prior to the resumption of work.

What duty of care does an employer have in respect of the health and safety of employees and visitors in the workplace?

Employers have a legal duty to guarantee the safety of employees and visitors to the workplace. Failure to discharge the duty may give rise to claims for negligence and occupational liability.

How can an employer create a safe workplace?

Where possible, health and safety protocols to be established at the workplace should include deep cleaning, wearing face masks, temperature reading, hand washing, disinfecting common areas, social distancing, limitation of visitors, errands and maximum of 20 or less people in a given area.⁹

What should an employer do if someone on the premises develops Covid-19 symptoms?

If someone on the premises develops COVID-19 symptoms, the employer should comply with the NCDC Guidance¹⁰ and recommendations.

Can employers insist that employees undertake medical tests before resuming work?

As a precautionary measure and if allowed by the authorities, employers could request or insist that workers or employees undergo medical examinations before resuming work, provided it complies with contractual terms, HR policies, etc. Care must be taken to avoid claims for discrimination.

Can an employer insist that its employees obtain vaccines whenever they become available?

For an employer to insist that employees obtain vaccines, it must be supported by legislation, a directive by an authorized agency or the terms of employment. Employers should review their contracts of employment and or HR policies to require employees to comply with such instructions.

What are an employer's options if an employee refuses to take the vaccine if and when it becomes available?

- If a legislation/regulation/directive mandates employees to obtain approved vaccines during epidemics, failure to comply could give rise to liabilities that could be enforced.
- If the employee has a contractual obligation to comply with all applicable health and safety measures, failure to obtain the vaccine will be a breach and entitle the employer to enforce the employment contract.
- In the absence of a legislation/regulation/directive or contractual provision, the employer may terminate the employment contract to prevent a risk of infection to the workforce.

⁹ The regulations remain silent on the size of the area and it is expected that common sense will prevail

¹⁰ For employers and businesses in Nigeria.

What should an employer do if an employee tests positive for COVID-19?

If an employee has tested positive for COVID-19, the employer should endeavour to identify all other employees who have had contact with the infected employee, and notify the authorities who will advise on further actions to be taken, based on an assessment of the work premises.

Should employers mandate employees to wear personal protective equipment in the workplace?

The Lagos State Government has mandated the use of face masks in public places with effect from April 27, 2020. The workplace may be considered as a public place. This directive will eventually become a regulation and non-compliance at the workplace may lead to sanctions.

Data collection and privacy

Are there laws governing data protection and privacy in Nigeria?

Yes. Click [here](#) for an overview of Nigeria's data protection and privacy laws.

What regulations govern the process for collecting medical and personal data?

The Nigeria Data Protection Regulation requires organisations to only collect personal information for reasonable purposes. Notice of the purpose of the collection must be given and consent obtained before collection, use and disclosure of such information.

For purposes of COVID-19 risk limitation, can employers prior to the resumption of work collect personal, medical, travel and any other related data from employees?

Employers could request that employees declare their health status and other information to determine whether they constitute potential risks to others. Employers should ensure that their policies or handbooks contain an obligation to furnish personal information upon request.

Legislation

Any there any pending bills relating to COVID-19 in the pipeline?

The House of Representatives is considering the Emergency Economic Stimulus Bill, which proposes among other things to grant a relief on Companies Income Tax to companies that maintain the same number of staff between March 1, 2020 and December 31, 2020. [Click here for the Bill.](#)¹¹

¹¹ The directives, measures and policies of the Federal and State governments and other MDAs can be found [here](#)

