

# COVID-19 AND CONTRACTS OF EMPLOYMENT: ISSUES ARISING

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# INTRODUCTION

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- The global impact of the Corona Virus has been defining for every sector of the global economy. Full or partial lockdown measures are now affecting almost 2.7 billion workers, representing around 81% of the world's workforce.
- With the nearly complete halt of economic activities in some states in Nigeria and closure of the country's borders, many businesses will face significant cost pressure and potential bankruptcy as a result of the economic contraction.
- It is therefore crucial to identify some prominent labour and allied issues arising from contracts of employment

# TORT OF NEGLIGENCE ARISING PRIOR TO THE LOCKDOWN ORDER?

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- Upon the discovery of an index case in Nigeria, but before the lockdown order, a number of businesses had taken work safety measures. However, certain businesses took no such measures.
- Can infected employees of businesses which failed to take important safety measures before and during the lockdown successfully establish a claim in tort of negligence?
- This would be determined on a case-by-case basis. Where an employee can prove that they contracted covid-19 as a result of the exposure occasioned by lack of safety measures in the workplace, a claim may be successfully founded on the tort of negligence.

# MEASURES BY EMPLOYERS TO REMAIN IN BUSINESS

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- The circumstances created by the lockdown include the following:
  - Some businesses remain virtually open with a steadily decreasing volume of work;
  - Some businesses are closed, because employers are no longer able to provide enough work to keep the employees fully engaged; and
  - Some businesses are closed because they are not of a type that can be done online.
- As a result of these, businesses are suffering depleted revenues. To remain afloat, employers may take certain measures with critical impact and legal considerations arising from their contracts of employment with employees.

# LEGAL CONSIDERATIONS IN IMPLEMENTING BUSINESS-AFLOAT MEASURES

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## Triangular Employment/Outsourcing Contracts

- A triangular employment involves a Service Provider (employer), a User Enterprise (a firm in need of services), and employees.
- As a result of the pandemic, the services of outsourced staffs may not be needed by the User Enterprise. The User Enterprise may, thus, halt payments made to the Service Provider, which may in turn halt remuneration paid to the employees.
- The Courts may award damages in favour of the employees, against both the User Enterprise and Service Provider.

## Temporary Suspension of Employment Contract

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- Contracts of employment are subject to the general principles of contract law. The performance of a contract of employment may be delayed or suspended, or non-performance thereof excused, on account of the occurrence of a *force majeure* event, if the contract makes provision for such.
- In the absence of an enabling provision in the employment contract or any statute to which the contract is subject, the employer cannot validly unilaterally suspend the performance of the contract, unless the parties agree to do so.

## **Variation of Employment Contract**

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- Employment contracts may be varied to provide for reduced working hours, reduced benefits, pay cuts, voluntary leave without pay, temporary layoffs, or other interim arrangement suitable to navigate the COVID-19 crisis.
- However, the employer is required to obtain the consent of the employee to vary the terms of the contract.
- Employers will be required to notify the relevant tax authorities, statutory agencies and pension fund administrators of the changes to the remuneration packages of the affected employees.

## **Termination of Employment Contract on the Ground of Frustration**

- An employment contract hugely impacted by the pandemic may be terminated upon the ground of frustration.
- An employer or employee may treat an employment contract as frustrated and itself as discharged from further performance of its obligations under the contract where a supervening event destroys the underlying fundamental assumptions of the contract.
- If the work of the employee may be done virtually, then the doctrine of frustration may not apply.



## Termination of Employment Contract on the Ground of Redundancy

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- An employment contract regulated by the Labour Act may also be terminated on the ground of redundancy.
- An employer who is no longer able to maintain its current workforce as a result of a business disruption which continues for a sustained period of time may declare a redundancy and render some of its employees redundant.
- The principle of “last in, first out” should be adopted in determining whose employment to terminate.
- In the absence of a contrary agreement, an employer may not recover redundancy payments paid to an employee upon re-call of the employee post-covid-19.

## Annual Leave Considerations

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- An employer may require its employees to utilise all or part of their annual leave during the “stay at home” period.
- However, such employees would be paid their full benefits and cannot be required to work during the period.
- Any variation in the employment benefit to be paid during the annual leave should be reached by agreement between the employer and its employees.

# CONCLUSION

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- It is unarguable that the several employment issues will arise post-covid-19.
- It behoves employers to understand the critical issues that may arise from their contractual obligations and find a way to alleviate their losses without breaching their contracts with their employees.

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# QUESTIONS

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Thank  
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