LEGAL FRAMEWORK FOR COVID-19 INDUCED HR MEASURES

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Introduction

COVID-19: Where we are

• On 11 March, 2020, the World Health Organization declared the novel coronavirus (COVID-19) a global pandemic. According to the International Labour Organization (ILO), the outbreak of the pandemic is a major labour market and economic crisis which could lead to the loss of up to 25 million jobs. The ILO says, “...(t)he effects will be far-reaching, pushing millions of people into unemployment, underemployment and working poverty…”

• In the aftermath of COVID-19, employers whose businesses have been negatively impacted are assessing the situation and considering legally permissible measures to remain afloat.

• Lack of government directives or regulations on treatment of employees post the COVID-19 outbreak.

• Economic Stimulus bill provides tax incentives for companies who retain their workforce by December 2020.

• Some of the key issues being considered in Nigeria by employers include whether the pandemic can be interpreted as a force majeure event absolving the employer from its employment obligations or whether the employer can rely on the doctrine of frustration to avoid such obligations.
Examining Applicable Legal/Regulatory Framework Relating to COVID-19 Induced HR Measures (1)

- Labour and employment issues in Nigeria are regulated by several laws such as:
  - The Labour Act (Principal Legislation)
  - Trade Union Act
  - Trade Disputes Act
  - Employee Compensation Act
  - Factories Act
  - Etc

- Workers: staff carrying out manual labour or clerical functions

- Non-Workers: staff carrying out executive, professional, administrative or technical functions

**COVID-19 Induced HR Options**

(a) Declaration of redundancy;
(b) Termination of employment;
(c) Furloughing/Temporary suspension;
(d) Extended leave with pay
(e) Extended leave without pay
(f) Conversion of lock down period to annual leave
(g) Remote working
(h) Renegotiation of contractual terms
Examine the Applicable Legal/Regulatory Framework Relating to Covid-19 Induced HR Measures (2)

**Declaration of Redundancy:**

**Workers**

In relation to workers, section 20 of the Labour Act lays down the following rules in the event of a redundancy:

(a) the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy;

(b) the principle of "last in, first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability and reliability; and

(c) the employer is expected to use his best endeavors to negotiate redundancy payments with affected workers.

NB: Redundancy is defined in the Act as “an involuntary and permanent loss of employment caused by an excess of manpower.”

**Non-Workers**

Unless stipulated in the contract of employment, an employer has no legal obligation to negotiate redundancy payments, but may only wish to do so in line with best practices.
Examining Applicable Legal/Regulatory Framework Relating to COVID-19 Induced HR Measures

**Termination of Employment**

Employer is permitted to employ and terminate an employee’s contract at will.

Exception: contracts with ‘statutory flavour’, and employment in the oil and gas sector which cannot be terminated at will, women on maternity leave

An employer is generally not obligated to provide reason for the termination.

*Recent position of the NIC: Giving reason for termination accords with international best practices.*

**Workers**

Termination by notice or salary in lieu of notice.

*Notice period (minimum requirements):*

one day, where the contract has continued for a period of three months or less;

(b) one week, where the contract has continued for more than three months but less than two years,

etc

**Non-Workers**

Termination by giving notice as stipulated in the contract of employment or payment in lieu of notice.
Examining Applicable Legal/Regulatory Framework Relating to Covid-19
Induced HR Measures (3)

**Furlough/Temporary suspension of Work/Leave without pay**

*Workers*

Employer has a duty to provide work suitable to the employee’s capacity on every day (except rest days and public holidays) on which the worker presents himself and is fit for work.

Duty to pay wages as though work had been provided.

*Exception:*

Temporary emergency or circumstances beyond employer’s control (not expected to exceed one week or such longer period as an authorized labour officer may allow)

In such a situation, the worker shall be entitled to wages for only the first day of the period in question.

*Non-Workers*

The terms of contracts of employment will determine. If contract is silent, an employer may negotiate a furlough with affected non-workers.

*Leave without pay*

*Workers*

Entitled to leave of at least six days with pay.
Examining Applicable Legal/Regulatory Framework Relating to Covid-19 Induced HR Measures (4)

**Remote Working**

- No regulations for remote working
- Employer ought to provide tools for remote working.

**Employee Compensation Act:**
Compensation for death or injury suffered by an employee in the course of his employment.

Defines work place as any place a person performs work or is required to be in the course of his employment.

**Renegotiation of contractual terms**

1. Reduction of salaries
2. Flexi-work structures Etc.

- Employer cannot unilaterally amend/alter the terms of the contract of employment
- Risk that the courts may declare some renegotiation terms as unfair labour practice and unenforceable
Covid-19: Force Majeure vs Frustration

**Force Majeure**

- Force majeure is a contractual term which excuses performance of the obligations under a contract because:
  - One of the events referred to in the force majeure clause (e.g.: a pandemic, governmental restrictions, new legislation, etc.) has occurred;
  - the event has prevented, hindered or delayed performance of the contractual obligations:
    - non-performance was due to circumstances outside of the defaulting party’s control; and
    - there were no reasonable steps that such party could have taken to avoid or mitigate against the event.

**Frustration**

Frustration is a doctrine which parties to a contract can rely on to avoid performing contractual obligations, where performance has been rendered impossible or impracticable as a result of supervening circumstances outside the parties’ control.

Frustration is usually invoked in the absence of a *force majeure* clause in a contract.

Where an employer is unable to reach an agreement with its employees on proposed HR measures in light of COVID-19 (eg: suspension of work, reduction of salary, etc.), such employer may, in the event of a dispute, successfully rely on either *force majeure* or frustration to justify non-performance of its obligations.
Examining Applicable Legal/Regulatory Framework Relating to Covid-19 Induced HR Measures

- One of the fall outs of the COVID-19 crisis will be a rise in disputes stemming from disagreements over allegations of:
  1. non-performance of contractual obligations;
  2. breach of statutory provisions;
  3. renegotiations of contractual terms.

- It is envisaged that some aggrieved employees may seek to challenge certain COVID-19 induced HR measures considered unfavourable.

- To mitigate the risk of such disputes or exposure to liability from such disputes, it is advised to seek legal advise on best labour & employment practices before implementation.
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