

1 MAY 2020

# Employment Revival Guide

Alert Level 4 Regulations



# Employment Revival Guide: Alert Level 4 Regulations

Alert Level 4 of the lockdown is geared toward the revival of economic activities and to allow employees involved in permitted services to resume work under certain conditions. The focus on the workplace is clear from the 29 April 2020 Regulations as they specifically exclude the workplace in the definition of gathering and allow persons who were not at their place of work before the lockdown to return. This revival guide is aimed at assisting employers in the resumption of operations in accordance with the Alert Level 4.

## 1. Employers' duties



- Develop a plan for a phased in return to work prior to reopening the workplace for business. The workplace plan must correspond with Annexure E of the Regulations and must be retained for inspection.
- The information contained in the workplace plan must include but not limited to the details of the employees permitted to return; how the employer intends to phase in the return to work, the details of the COVID-19 (Coronavirus) Compliance Officer and the health and hygiene protocols.
- Phase in the return of employees from other provinces, metropolitan and district areas.
- Provide employees who may come into direct contact with members of the public as part of their employment duties with protective equipment.
- Provide hand sanitisers at entrance and exit points for employees to use.

## 2. COVID-19 Compliance Officer



The employer must designate an employee in writing, as a Compliance Officer whose duties are to ensure that:

- The COVID-19 prevention measures are complied with.
- The COVID-19 health and hygiene protocols are complied with.
- The workplace plan is complied with.
- The name of the Compliance Officer must be displayed in a visible area or be communicated to employees.
- The requirement for the appointment of the COVID-19 Compliance Officer applies to all industries, business, entities, both in the private and public sectors.

## 3. Social and physical distancing



- The employer must determine the workplace area in square metres to maintain social distancing of one and half metres between customers, clients and/or employees.
- Social distancing includes enabling employees to work from home or minimising the need for employees to be physically present in the workplace.
- Restrict face to face meetings.
- Take special measures for employees with known or disclosed health issues or conditions which may place such employee at higher risk of complication or death if they are infected with COVID-19.
- Take special measures for persons above the age of 60 who are at risk of complications or death if they are infected with COVID-19.
- Ensure that employees in courier or delivery service have minimal personal contact during delivery.

### DISCLAIMER:

The Employment Revival Guide is an informative guide covering a number of topics, which is being published purely for information purposes and is not intended to provide our readers with legal advice. Our specialist legal guidance should always be sought in relation to any situation. This version of the survival guide reflects our experts' views as of 1 May 2020. It is important to note that this is a developing issue and that our team of specialists will endeavour to provide updated information as and when it becomes effective. Please contact our employment team should you require legal advice amidst the COVID-19 pandemic.

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### 4. Essential and permitted Services



- Alert level 5 lockdown only allowed persons and businesses performing essential services to operate subject to certain health and safety conditions. Essential services is defined in the Labour Relations Act (LRA) as those services that, if interrupted would endanger the life, personal safety or health of the whole or any part of the population.
- Essential services contained in Annexure D of the Regulations include but are not limited to medical, health, emergency, banking, social grant provision, electricity, water and fuel production, payroll systems, and mining.
- Permitted services were introduced in the Alert Level 4 as part of the gradual reopening and revival of the economy and business operations. Although permitted services are not defined in the Regulations, permitted services as contained in Table 1 of the Regulations include but are not limited to services in agriculture, certain manufacturing services, construction, wholesale and retail trade, transport and communication services and financial and business services.
- Persons performing essential or permitted services must be duly designated in writing by the head of an institution, on a form that corresponds with Form 2 in Annexure A of the Regulations. A head of an institution includes an accounting officer of a public institution, CEO or equivalent in a private institution.
- The 20h00 to 05h00 curfew does not apply to persons performing essential and permitted services. They are also allowed to move between provinces, metropolitans and districts for purposes of commuting to and from work.
- Persons who are issued with the permit and designated to perform essential or permitted services are required to be in possession of the permit and form of identification at all times during the lockdown. Where such person does not present any form of identification, he or she will be required to return to his or her place of residence.

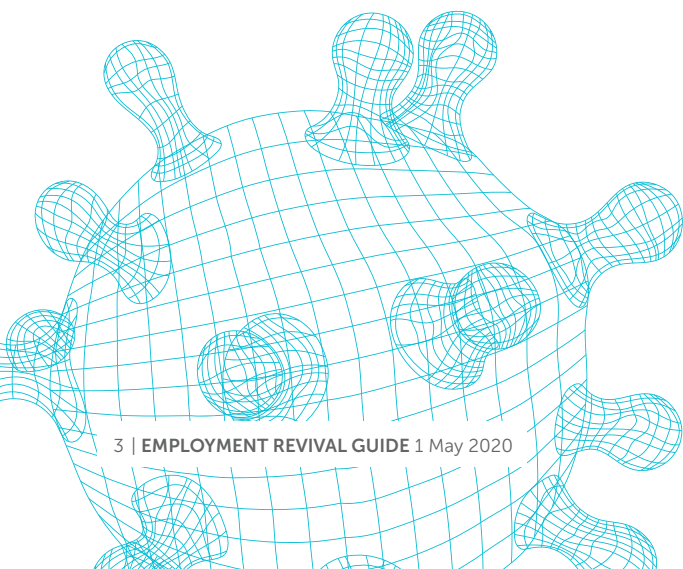
### Health and safety

The COVID-19 Direction on Health and Safety in the Workplace, which was issued by the Minister of Employment and Labour in terms of Regulation 10(8) of the National Disaster Regulations, is entitled 'COVID-19 occupational health and safety measures in workplaces COVID-19 (C19 OHS) 2020'. The purpose of this Directive is to stipulate the measures to be taken by employers in order to protect the health and safety of workers and members of the public who enter their workplaces or are exposed to their working activities, and ensure that the measures taken by employers under the Occupational Health and Safety Act (OSHA) are consistent with the overall national strategies and policies to minimise the spread of COVID-19.

### 5. Who will be considered as a worker in terms of C19 OHS?



Any person who works in an employer's workplace, including an employee of the employer or contractor, a self-employed person or volunteer.



## Employment Revival Guide: Alert Level 4 Regulations...continued

### 6. Who does the C19 OHS apply to?



This Directive applies to employers and workers in respect of the manufacturing, supply or provision of essential goods or services, as defined in Schedule 2 of the Regulations in terms of section 27(2) of the Disaster Management Act and any workplace permitted to continue or commence operation before the expiry of those Regulations.

### 7. What are the symptom screening requirements for employers?

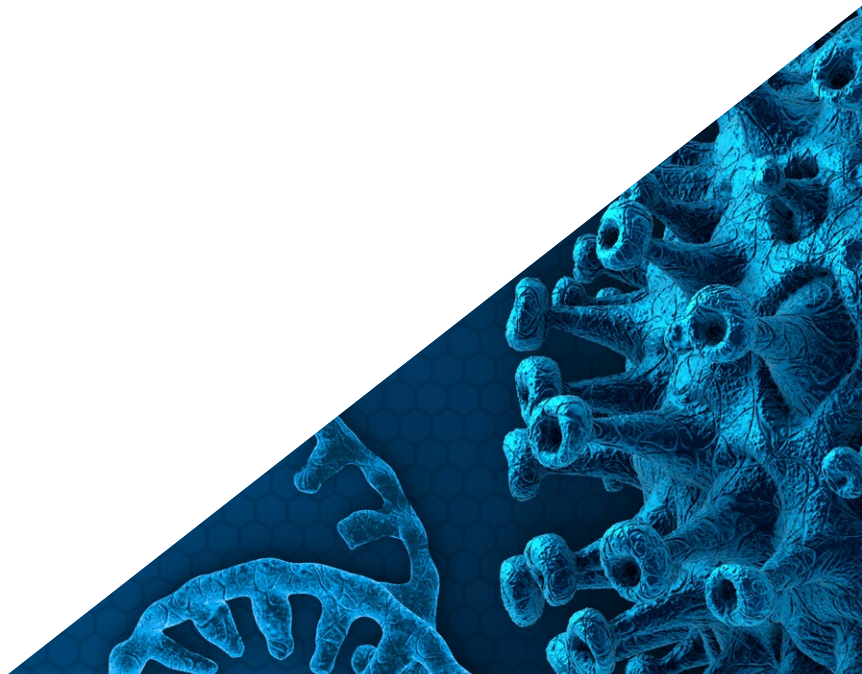
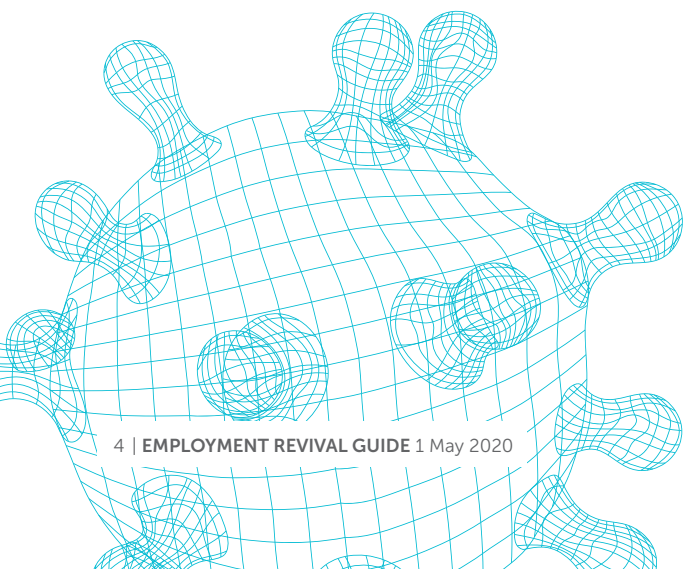


- Every employer must take measures to screen any worker at the time they report for work to ascertain whether they show any COVID-19 symptoms, for example fever, cough, sore throat, redness of eyes or shortness of breath or difficulty breathing.
- Every employer must require every worker to report as to whether they suffer from the following symptoms: body aches, loss of smell or taste, nausea, vomiting, diarrhoea, fatigue, weakness or tiredness.
- Every employer must require workers to immediately inform the employer if they experience any of the symptoms above while at work.
- Employers must comply with any guidelines issued by the National Department of Health in respect of symptom screening and medical surveillance and testing, if required.

### 8. What must an employer do when a worker presents, or informs the employer of, symptoms of COVID-19?



- The employer must not permit the worker to enter the workplace or report for work.
- If the worker is already at work, the employer must immediately isolate the worker, provide them with an FFP1 surgical mask and arrange for the transport of the worker to be self-isolated, or to go for a medical examination or testing. The transport of the worker must not place other workers or members of the public at risk.
- The employer must also assess the risk of transmission, disinfect the area and the worker's workstation, refer workers who may be at risk for screening and take any other appropriate measure to prevent possible transmission.



## Employment Revival Guide: Alert Level 4 Regulations...continued

### 9. Can an employer place a worker who presents symptoms of COVID-19 on sick leave?



Yes, the employer must place this employee on sick leave in terms of section 22 of the Basic Conditions of Employment Act (BCEA). If the employee's sick leave entitlement is exhausted, the employer must make an application for an illness benefit in terms of COVID-19 TERS.

### 10. What measures must the employer take to prepare the workplace during COVID-19?



- The employer must ensure that all work surfaces and equipment are disinfected before work begins, regularly during the working period and after work ends;
- Disable biometric systems or make them COVID-19-proof.

### 11. Can the employer deduct money from employees' salaries for hand sanitisers and disinfectants placed at the workplace or provided to employees?



No, the employer must, free of charge, ensure that there are sufficient quantities of hand sanitiser based on the number of workers or other persons who access the workplace at the entrance of, and in, the workplace which the workers or other persons are required to use.

### 12. What if the employees do not work from the workplace?



The employer must provide adequate supply of hand sanitiser to every employee who works away from the workplace, other than at home.

### 13. Must employers provide face masks to its employees?



- Yes, employers are required to provide each of its employees, free of charge, with a minimum of two cloth masks, which comply with the requirements set out in the Guidelines issued by the Department of Trade, Industry and Competition, for the employee to wear while at work and while commuting to and from work.
- The employer must also require any other worker to wear masks in the workplace.

### 14. What other PPE is required?



The employer must check regularly on the websites of the National Department of Health, National Institute of Communicable Diseases and the National Institute for Occupational Health whether any additional PPE is required or recommended in any guidelines given the nature of the workplace or the nature of a worker's duties.

### 15. What are the employer's social distancing requirements?



- The employer is required to arrange the workplace to ensure that there is a distance at least 1,5 metres between workers and members of the public or between members of the public; or put in place physical barriers or provide workers with face shields or visors;
- If appropriate, undertake symptom screening measures of persons other than the employees entering the workplace with due regard to available technology and any guidelines issued by the Department of Health;
- If appropriate, display notices advising persons other than employees entering the workplace of the precautions they are required to observe while in the workplace;
- Require members of the public, including suppliers, to wear masks when inside their premises.

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### 16. Do employees have obligations?

- The employee and the employer share the responsibility for health in the workplace. Therefore, both the employee and employer must pro-actively identify dangers and develop control measures to make the workplace safe.
- For this reason, employees should abide by any policies adopted by the employer to curb the spread of COVID-19. Employees should also inform their employer if they are aware of any risk to the health of their colleagues. Employers may expect union demands before their members return to work.



### 17. What does the Notice on Compensation for Occupationally-Acquired Coronavirus Disease (COVID-19) under COIDA (the Notice) issued by the Minister cover? Will it apply after the lockdown?

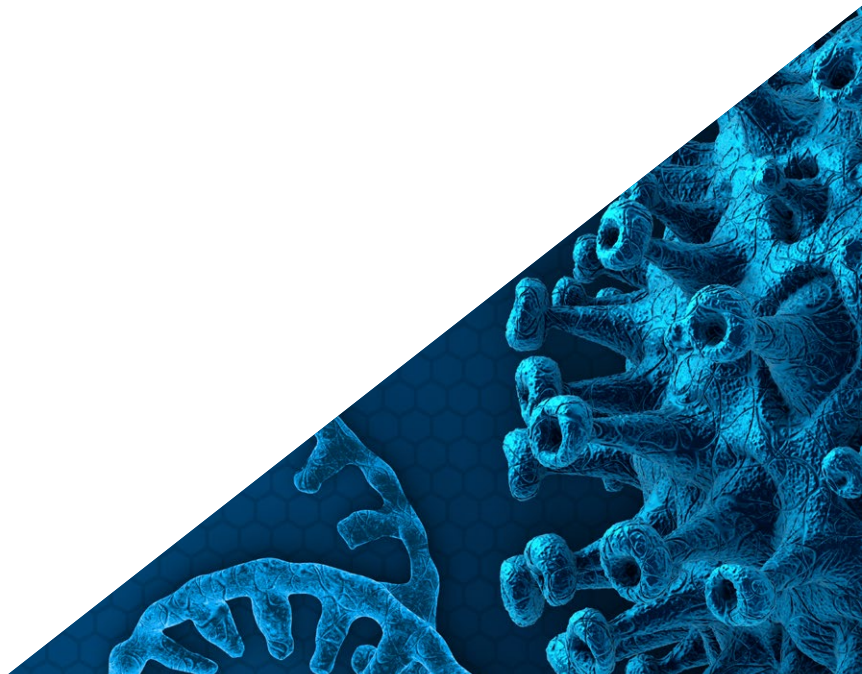
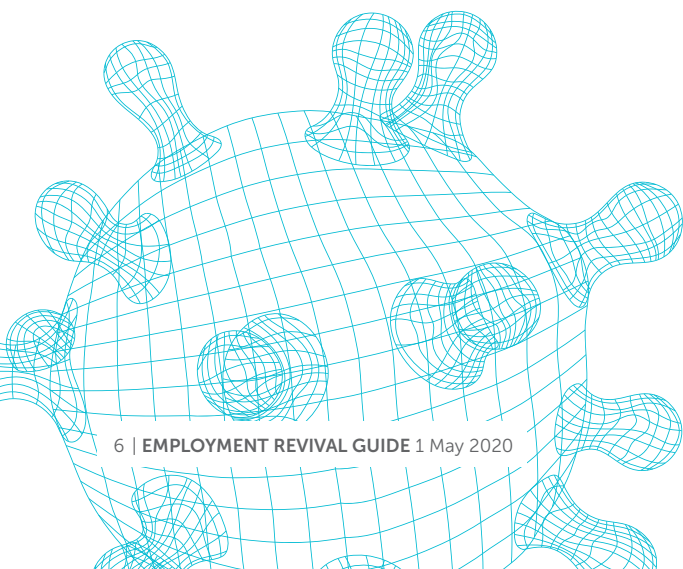
The Notice extends compensation under COIDA to occupationally acquired COVID-19 if it is contracted by an employee arising out of and in the course and scope of his/her employment. It will apply until being revoked.



**Annexure A of the C19 OHS Directive is a Sectoral Guidelines Template dealing with risk assessment, engineering controls, administrative controls, health and safety work practices, PPE, and provision of safe transport for employees.**

### 18. What are the considerations regarding COVID-19 and pregnancy in the workplace?

In terms of the common law, an employer has a duty to provide a safe working environment for its employees. This is further qualified by the legal obligation of an employer to maintain a working environment that is safe and healthy, as determined by the Occupational Health and Safety Act 85 of 1995 (OHS Act). Similarly, the BCEA 75 of 1997 expressly provides for the protection of employees before and after the birth of a child, in that no employer may require or permit a pregnant employee (or an employee who is nursing her child) to perform work that is hazardous to her health or the health of her child. There are various steps an employer may consider to give effect to its obligation towards a pregnant employee.



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### TERS and other remuneration related issues

In terms of a Directive the Temporary Employer/Employee Relief Scheme (C-19 TERS) was created to ensure that workers who have lost income due to the pandemic or who were required to take annual leave, receive special benefits from the UIF to avoid them being laid off.

### 19. What is the difference between C-19 TERS and the National Disaster Fund?

The National Disaster Fund announced by the Minister in fact became TERS and there is no other fund.

### 20. When does TERS apply?

Should an employer as a result of the COVID-19 epidemic close its operations or a lesser part thereof for a period of three months or a lesser period, affected employees qualify for the C-19 TERS special benefits.

### 21. What is the special benefit and how is it calculated?

- The scheme pays a portion of the salary of the employees (registered for UIF) during the temporary closure of the business. The salary taken into account to calculate the benefits is capped at R17,712 maximum. The UIF calculates the benefit according to the income replacement sliding scale (38%-60%) as provided in the Act. As an example an employee earning R17,712 or above will receive a benefit of R6,730 (38% of the maximum). Employees earning less will receive a greater percentage of up to 60% at the lowest salary level.
- If the benefit falls below R3,500 according to the income replacement sliding scale the employee receives R3,500.

### 22. How much must the employer claim in respect of an employee?

The UIF calculates the benefit according to the income replacement sliding scale (38%-60%) as provided in the Act. The employer does not calculate the benefit.

### 23. The Directive urges employers to pay the employees the TERS benefit and set the payment off against the payment from UIF. What is the amount?

The amount must be calculated in accordance with section 12 and 13 of the UI Act and in accordance with calculator provided.

### 24. Is there a TERS claim if the employer advanced the employee a loan in lieu of paying a salary?

Yes. The employee may claim, as a loan is not the same as payment of remuneration. Loans should be interest free as otherwise it may constitute a credit agreement and the employer must register as a credit provider.

## Employment Revival Guide: Alert Level 4 Regulations...continued

### 25. May the employer submit a TERS claim if it paid the employees in full when they did not work?

The Directive is silent on this. The Memorandum of Undertaking that must accompany the claim makes provision that the company may reclaim the benefit. An employee may not benefit more than what they should have been paid.



### 31. Can employees that are foreign nationals be added to the claim?

Yes, provided they are registered for UIF. There is provision for a passport number and otherwise a valid permit is required (the temporary "maroon" passport).



### 26. May a TERS claim be submitted for an employee on short time?

If the short time (reduced hours) is as a result of a partial close down of the operations due to COVID-19 it is a TERS claim. Otherwise it may be a claim for the reduced hours benefit ordinarily provided by the Act.



### 28. May an employee submit a TERS claim?

No.



### 29. What protection is there for monies paid in terms of TERS?

The funds paid in terms of TERS do not fall into the general assets of the recipient employer or BC and must be applied in terms of TERS only. The UIF may audit the distribution of the funds.



### 27. Who must claim?

- A Bargaining Council (BC) may enter into an MOA with the UIF. The parties to the BC must have entered into a BC collective agreement extended by the Minister to non-parties in the sector. Employers must submit their claims in the sector to the BC. The BC must open a special bank account to administer the monies.
- In the absence of a BC an employer who employs more than 10 employees submitting a TERS claim must enter into an MOA with UIF. When the employer receives payment the employer must pay the employees within two days.
- An employer who employs 10 or less employees may claim on their behalf but the UIF will make payment directly into the bank accounts of the employees.



### 30. Employees that were on maternity leave when the lockdown commenced and are due back during the course of the lockdown. May they be added to the TERS claim?

They may be added for the benefit from the date of return to work provided they otherwise qualify.



### 32. An employee started in Feb and therefore has two payslips, but came from another company where he would have been contributing to UIF, must his Jan payslip from his previous employer be submitted to claim the benefit?

UIF requires three payslips. It should be sufficient to submit the two payslips otherwise the Directive does not make sense.





## Employment Revival Guide: Alert Level 4 Regulations...continued

### 33. What about an employee who started 1 April 2020 and the business is temporarily closed?

UIF requires three payslips. It should be sufficient to submit one payslip at the end of the month, otherwise the Directive does not make sense.



### 34. Is an employee entitled to the normal pay for the public holidays even if the employee is on layoff? Is there a TERS claim?

The employee is not entitled to normal pay as the employee cannot work. When the employer agreed to pay the employee, the employee may be entitled to normal pay depending upon the terms of the agreement and there may be a TERS claim.



### 35. Is there a TERS claim where the employer required the employee during the lockdown to take annual leave in terms of section 20(10) of the Basic Condition of Employment Act?

An employer, who has required an employee to take annual leave may set off any amount received from the UIF in respect of that employee's COVID-19 benefit against the amount paid to the employee in respect of annual leave provided that the employer credits the employee with the proportionate entitlement to paid annual leave in the future.



### 36. What about employees placed on annual leave during the lockdown - do they get paid for public holidays and if not, may they claim under TERS?

Employees on annual leave must be paid for the Public Holiday as under normal circumstances. There is a TERS claim in respect of the leave.



### 37. Employees are on a Fixed Term Contract ending March 2020. The business closed. They have no annual leave to utilise while on lockdown, must the employer implement unpaid leave or pay a prorated salary? Is there a TERS claim?

The contract ends 31 March 2020. The employer is not obliged to pay them. There is a TERS claim until 31 March 2020.



### 38. How are commission earners who cannot work affected? What is their "salary"?

There is a TERS claim. Section 12 of the UI Act requires the average income over the preceding six months if there is a significant fluctuation in income.



### 39. Is TERS available to essential service companies?

Yes, all companies where there is a closure of the operations or a part thereof.



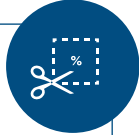
### 40. Should the lockdown not be extended, can a company still implement a temporary layoff as from 1 May to 31 July and claim in terms of TERS?

Yes, provided the layoff is done by agreement and there is a TERS claim if it is due to a temporary closure of the operations or part thereof due to COVID-19. There is a contrary view to this. The special benefit is limited to three months.



## Employment Revival Guide: Alert Level 4 Regulations...continued

### 41. Is there a TERS claim for TES employees who earn above the threshold if they took pay cuts?



There is a TERS claim if the pay cut is due to the closure of the business or a part thereof.

### 42. The employer is in the manufacturing sector and employs weekly paid wage earning staff. The business is closed and it is a non-essential service. The employer agreed to pay its staff during the lockdown thinking it can claim the payments back from UIF (TERS). Is that possible? How is that done? The employee does not have the funds and needs to recoup the payments.



The agreement to pay is binding unless amended by agreement. There is a TERS claim limited to the TERS benefit which goes to the employer unless the agreement is amended when there is a claim if there is a loss of income.

### 43. Must a company be in financial distress before there is a TERS claim?



No.

### 44. If an employee is retrenched during the lockdown because of the National Disaster, may the employee claim under TERS or simply in terms of UIF? And for how long?



TERS is only available for temporary closures of the operations or a part thereof. It is not reasonable to retrench employees due to a partial closure. Having been retrenched the employee has a claim against the UIF based on the applicable formula having regard to how long he was a contributor.

### 45. What is the illness benefit in terms of TERS?

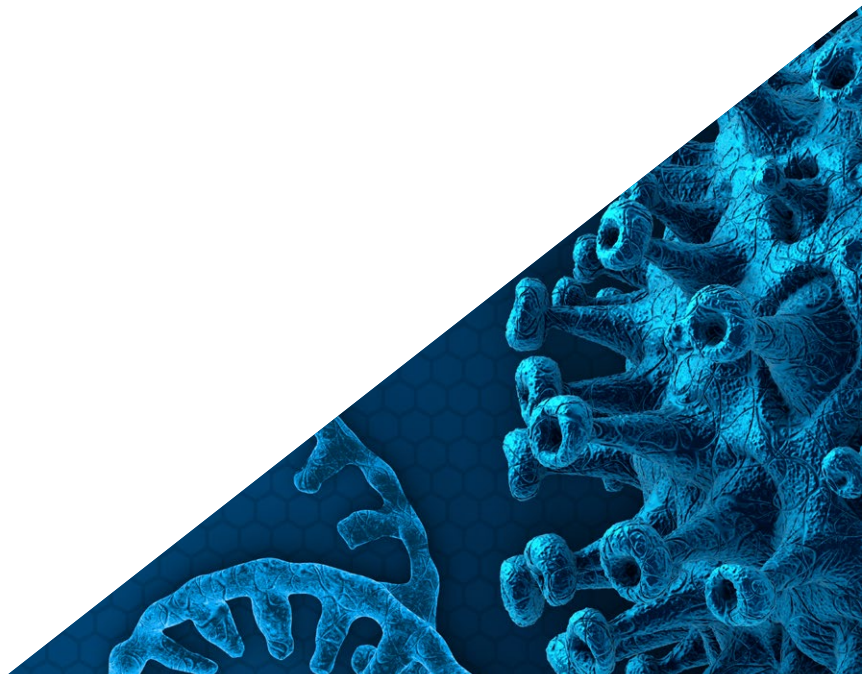
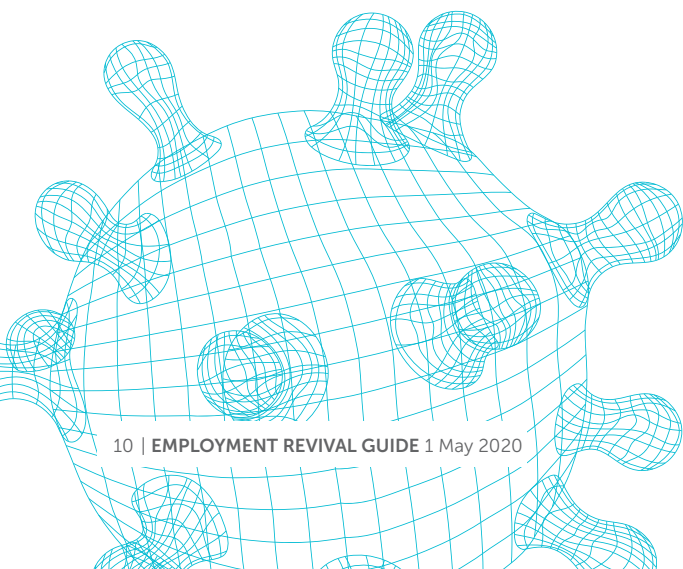


- C-19 TERS provides that where an employee is quarantined for 14 days the employee shall qualify for the illness benefit. Confirmation letters from the employer and the employee that the employee was in an agreed pre-cautionary self-quarantine are sufficient to obtain the benefit.
- Where an employee is quarantined for a period of longer than 14 days, a medical certificate from a medical practitioner is required accompanied by the prescribed continuation from before payment will be made.

### 46. Until when is the illness benefit available?



The Directive applies for three months unless withdrawn. The illness benefit is available for three months.



## Employment Revival Guide: Alert Level 4 Regulations...continued

### 47. Does an employee accrue leave during the lockdown when the employee is not working?

It depends upon the contract of employment. If the contract specifies the accrual of leave at 15 days per leave cycle, leave accrues. If they accumulate leave at 1,25 days per month for every month worked or one day for every 17 days worked leave will not accrue.



### 48. Employees must take their annual leave within six months after the leave cycle. If their leave was scheduled during the lockdown, can it be cancelled and moved to another later date in the year even after the 18 month period?

When leave has been granted to an employee the employer cannot unilaterally cancel the leave. The leave may by agreement be rescheduled for later.



### 49. May an employer during the lockdown institute disciplinary proceedings? Can an employee who is working be dismissed for breaking lockdown rules if they are only meant to commute between home and work?

Yes, an employer may institute disciplinary proceedings. The normal principles apply as to misconduct committed outside working hours and away from the workplace. The penalty for breaking lockdown rules will depend upon the facts of the matter.



### 50. The employer has implemented a temporary layoff during the lockdown, however now certain employees are required to be available for certain duties, what is the obligation of employees if initially placed on temporary layoff?

When the employer can provide work the employees are obliged to render the services for which they must be paid.



### 51. Can an employer after the lockdown implement a temporary layoff?

Only by agreement or in terms of a collective or other agreement.



### 52. How does an employer, after the lockdown, obtain the agreement of employees for a temporary layoff or reduction in remuneration?

Through the protracted section 189 or 189A process. Employers are advised to take advice on the process before commencing any discussions.



### 53. Is there a different retrenchment process during the lockdown or National Disaster?

No. The procedure in section 189 or 189A still applies. Employers may embark on a retrenchment process during the lockdown provided it is possible to meaningfully consult with the affected employees and a union if any.



### 54. Is it a fair reason to retrench employees after the lockdown because the employer realised that it can do better business by employing technology?

Yes, provided the employer can show it is so and follows a fair procedure.



### 55. What happens when the probation period of an employee comes to an end during the lockdown period and the employee is not working?

It is fair to extend the probationary period. The extension depends upon the facts.



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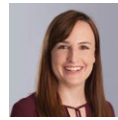
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