SADA

GUIDELINES

MANAGEMENT OF EMPLOYEES – POST LOCKDOWN PERIOD

The South African Dental Association **(SADA)** NPC

Introduction

The extended lockdown translated into financial woes for everyone. All practitioners are struggling with one moral dilemma: to save the business or save livelihoods.

Many organisations around the world have now resorted to the work from home policy to keep their employees safe and operations running to a certain extent. This is not always possible for the dental profession or their employees. However, with each passing day, people are only growing anxious about when everything will be normal again. But with no cure developed yet, the overall situation doesn't seem to get better anytime soon.

It's now time for practitioners to start thinking about their approach once the lockdown is over.

Practitioners as employers whose businesses are severely impacted by the spread of COVID-19, may be thinking of how they are going to retain some or all of their staff, how will they afford to pay salaries if the practice itself is not fully functional and generating sufficient income.

Practitioners also need to be mindful that although it is unknown how long the COVID-19 crisis will prevail, it may be temporary. Accordingly, to err on the side of caution, alternative employment measures should be considered first and foremost prior to considering retrenchment.

In an attempt to ameliorate the detrimental impact on employees, the Unemployment Insurance Fund ("UIF") was identified to provide a dedicated relief scheme (the COVID-19 Temporary Employer-Employee Relief Scheme). However, given the publicly and officially acknowledged lacklustre capacity and administrative capability of the UIF, and the vast number of claims that will have to be processed, UIF benefits may be delayed for weeks, possibly months. This will be cold comfort to employees that live hand-to-mouth and rely on receiving payment to survive during the extended lockdown which will take us beyond the next payday.

Annual Leave

Annual leave is regulated under s 20 of the BCEA. Section 20(10) provides, *inter alia*, that annual leave must be taken in accordance with a written employment contract between an employer and employee. If there is no agreement, annual leave must be taken at a time determined by the employer in accordance with s 20. For example, many Employers request that annual leave be taken during the December/January holiday period and employees by virtue of their employment contract with the employer which could stipulate such an agreement have agreed to same.

The Department of Employment and Labour published a Directive on Covid-19 and implications on the leave provisions as set out in the Basic Conditions of Employment Act 75 of 1997 as well as the Covid-19 Temporary Employee / Employer Relief Scheme. It clarified that during the Covid-19 nationwide lockdown period, an employee may be requested by his or her employer to utilize their annual leave credits and further that the BCEA lawfully allows.

Employers who remained closed during lockdown were able to invoke their right to withhold remuneration for the period where employees could not tender service.

Many practitioners although classified as essential services either remained closed or offered emergency treatment with limited clinical staff only.

Those that remained closed or partially open may have chosen the option of forcing their employees to utilise their annual leave credits during COVID-19 lockdown period and its extension. This was in an effort to ensure they continued to receive salaries during the lockdown, placing staff on annual leave during this period softened the blow for employees, albeit at the expense of their annual leave allotment.

The Directive was later updated, which allowed employers to set off an amount received from the UIF in respect of a new Covid-19 annual leave benefit, from amounts paid to employees for annual leave taken during the lockdown.

This additional claim will allow some employees reprieve in that their annual leave should be credited as their employers will receive payment of this new benefit from the UIF. In a further amendment to the Directive, the Minister urged employers to calculate the Covid-19 UIF benefits staff will receive from UIF and pay this to staff, with a view to offsetting or reimbursing it once employers receive payment from the UIF.

In practice, this meant that almost all staff, save for those earning the national minimum wage, will receive an annual leave Covid-19 benefit that is significantly less than their full (actual) remuneration received from their employers for the annual leave taken during the lockdown.

After lock down and due to lack of business, employers may engage with employees, where written employment contracts are in place, to take their annual leave after lock down when the practice is not so busy. This will apply if the employee were not forced to take annual leave during lock down and there is leave accruing to the employee which can be taken for 21 consecutive days (15 working days).

Did employees continue to accrue annual leave during the lockdown period?
In relation to those employees who worked in essential services and were present at work and those who are working remotely, the answer is simple: yes, they continue to accrue leave.

The issue is somewhat more complex in respect of employees who are not able to work during this time either because the practice was completely closed, employers requested them not to come or because of lockdown regulations.

The BCEA provides that an employee is entitled to a minimum of 21 consecutive days paid annual leave (about 15 working days) in respect of each annual leave cycle, being a period of 12 months' employment with the same employer.

If an employee's employment contract entitles her/him to a specified number of days' leave per annual leave cycle, the employee accrues annual leave irrespective of whether s/he works or is entitled to be paid. (Thus,

annual leave would accrue during a period of unpaid maternity leave or paid sick leave.) In these circumstances, the employee would accordingly continue to accrue annual leave during the lockdown, even though s/he did not work and was not paid.

In terms of the BCEA, an employer and an employee may agree an alternative method of determining the annual leave entitlement, namely one day's leave for every 17 days worked or for which the employee was entitled to be paid**,** or one hour's leave for every 17 hours worked or for which the employee was entitled to be paid**.** Thus, if the employment contract regulates the employee's annual leave entitlement in terms of this formula, the employee would not accrue annual leave during the lockdown.

In the event that employees and employers agree to a reduction of working hours together with a correlating reduction in pay during, or after, the lockdown period, employers should also consider the treatment of annual leave.

The parties could potentially reduce the employee's annual leave entitlement proportionately to the reduction in hours worked (but not below the BCEA threshold), or they could agree that the annual leave entitlement shall remain unchanged.

Can employers and employees agree to postpone the forfeiture of annual leave?

What is clear from the Alert Levels and regulations published under each level, and for the foreseeable future, is that they may be restrictions on the movement of people and although this may not apply to essential service workers like dental practices.

These restrictions on movement and travel may affect employees' desire to take their annual leave during the national state of disaster. Depending on the agreement regulating leave, employees may forfeit accrued but not taken leave in these circumstances.

Many employers take the 'use it' or 'loose it' approach, but may want to reconsider and vary the terms relating to the forfeiture of leave, if they are in a position to do so. Ordinarily, many employers in accordance with the Basic Conditions of Employment Act, require employees to take annual leave not later than six months after the end of the annual leave cycle.

Where the annual leave cycle runs from January to December each year, the employee's annual leave entitlement in respect of that annual leave cycle would lapse by 30 June of the following year. Many employment contracts accordingly contemplate the forfeiture of annual leave after 30 June each year.

In the case where employees have taken their annual leave during the national state of disaster, the issue of forfeiture is unlikely to arise. Employers are at liberty, in the absence of an agreement to the contrary, to require employees (even those working as Level 4 or Level 3, permitted or essential workers) to take annual leave at a time convenient to the practice, including during the national state of disaster.

However, where employees have not taken their annual leave, they may now be faced with the possibility of forfeiting their annual leave because it is due to expire on 30 June 2020 as many practices will only be coming on line from 1 June 2020.

In order to prevent this from happening, the employer can (but is not required to) agree with employees to change the date of forfeiture in respect of the current annual leave cycle only and for a limited period. This should not present any issues from employees as this amendment to their terms and conditions of employment would be in their interest and for their benefit.

Dental Practitioner/s employed in a practice entitled to annual leave

A common misconception amongst practitioners is that as dental practitioners are normally paid on a commission basis, they are not employees and, in some cases, considered independent contractors and thus not entitled to annual leave, sick leave or family responsibility leave.

It is important firstly to determine if there is an employment arrangement between you and your staff. This may seem a simple place to start, but has far reaching effects. This is not determined by whether you have an Employment Contract or not (while it is important to have this)

Section 200A of the Labour Relations Act (LRA) and section 83A of the Basic Conditions of Employment Act (BCEA) created a rebuttable presumption as to whether a person is an employee
and therefore, covered by the Act. A person is presumed to be an employee if they are able to establish that one of seven listed factors is present in their relationship with a person for
whom they work or to whom they render services.

The presumption comes into operation if the applicant establishes that one of the following seven factors is present -

a) the manner in which the person works is subject to the control or direction of another person.
b) the person's hours of work are subject to the control or direction of another person.
c) in the case of a person who works for an organisation, the person forms part of that organisation.
d) the person has worked for that other person for an average of at least 40 hours per month over the last three months.
e) the person is economically dependent on the other person for whom he or she works or renders services.
f) the person is economically dependent on the other person for whom he or she works or renders services.
g) the person only works for or renders services to one person.

These presumptions apply to employees earning less than annual threshold of R205 433.30 per year, but the factors listed in the presumption may be used as a guide for the purpose of determining
whether a person is in reality in an employment relationship or is self-employed.

Dental Practitioner paid commission-based salaries

If a staff member is paid on a commission basis, the only difference will be that no UIF is payable on the commission portion. Should no UIF be paid, it is important then that the staff member is aware of the fact that if they are unemployed, or go on maternity leave, they will not be covered by UIF for the commission portion of their salary.

Other than the UIF regulation, there is no difference to the employment rights and entitlements that commission-based salary staff members have as compared to fixed salaried staff.

Thus if a dental practitioner employee can demonstrate an employment relationship in accordance with the above, are not afforded annual leave (minimum of 15 days per year), sick leave (30 days in a 3 year cycle) and family responsibility leave benefits (3 days per year), to which they may be entitled to. This may be in contravention of the relevant labour laws.

To reiterate then: If you pay a staff member on a commission or per patient rate basis rather than a fixed salary, they may be entitled to ***PAID*** Annual leave, Sick leave and Family responsibility leave.

The provisions in the BCEA for annual leave pay can be found in section 21(1) read with section 35(4).
Section 21(1) provides that:
An employer must pay an employee leave pay at least equivalent to the remuneration that the employee would have received for working for a period equal to the period of annual leave calculated:

- at the employee's rate of remuneration immediately before the beginning of the period of annual leave; and
- In accordance with section 35.

Similar provisions can be found in the BCEA for notice pay and severance pay calculations.

Section 35(4) specifies how to calculate leave, notice and severance pay as follows:
If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period any payment to that employee in terms of this Act must be calculated by reference to the employee's remuneration or wage during:

a) The preceding 13 weeks; or
b) If the employee has been in employment for a shorter period that period.

Also note that while the BCEA specifies the averaging period as 13 weeks (3 months), this can be interpreted to be a minimum period and if a fairer overall result for both the employer and the employee can be achieved by taking the average over the entire year, then this is acceptable.

The employee's earnings while on leave will then be exactly the same as when he is working. If the employee taking leave earned fluctuating remuneration (overtime, commission or a performance bonus) in the 13 weeks prior to taking leave, then these fluctuating payments must be averaged over the 13 weeks prior to the leave being taken, and included into the remuneration rate per day that is used to calculate the employees leave pay while on leave.

These practitioner employees would similarly be entitled to sick leave and family responsibility leave.

Sick Leave

If employees are unable to work because they are sick, they are entitled to paid sick leave (if they work 5 days per week: this is 30 days in a 3-year cycle or if they work 6 days per week: this is 36 days in a 3-year cycle). If an employee is not sick, he or she cannot be required to take sick leave. Employers can require proof of illness such as a medical certificate for the period the employee is booked off from work for sickness.

If employees cannot attend work because they are infected with CoVID-19, are they entitled to receive pay?

Employees who cannot work because they have been infected with CoVID-19 will be entitled to sick leave on full pay in the usual way.

In order to qualify for paid sick leave employers may require employees to provide it with a valid medical certificate in terms of which the employee has been booked off from work for the days on which they are absent.

Medical practitioners are required to certify employees as being unable to perform any duties (even from home). Medical practitioners are required to divulge this level of detail in their medical certificates and where such information is absent, the employer should make enquiries with the doctor for clarity.

Once their sick leave has been exhausted, they will have to take unpaid leave, unless the employer is willing to provide additional sick leave, over above that which the legislation prescribes.

Employees absent from work due to medically advised self-isolation

Regarding employees who are absent from work due to medically advised self-isolation or quarantine is more uncertain.

Any exclusion period should be reasonable and no longer than is necessary to establish that the person is not infected with CoVID-19.

In order to avoid employees being reluctant to self-isolate, where necessary, it is recommended that employers treat this absence as sick leave or agree for the time to be taken as annual leave, unless the employee is able to work from home in which case the time should not be docked as sick leave or annual leave

If the government direct that practice shutdown, are practitioners required to pay their employees?

No.

A distinction must be drawn between employees who can work from home and those who cannot. Those who can work from home should be required to continue working, albeit from home, in order for them remain eligible to receive their salaries.

Where employees cannot render service from home, the prohibition on them working is through no fault of theirs or of the employer. The prohibition of work would, therefore, constitute a force/vis majeure which, which would temporarily suspend the obligations of the parties in terms of the contract of employment, i.e., the obligation to work and the obligation to pay. This aligns with the South African common law principle of “no work no pay”.

To ameliorate these adverse consequences, practitioners could consider forcing their employees to take annual leave during the period of government-forced shutdowns.

If a practitioner implements a shutdown of his/her own volition, must it continue to pay its own employees?

Where employers implement shutdowns of their own volition (i.e., not due to government-forced shutdowns) they must obviously continue to pay their employees who stay at home.
In this scenario, the employees, hypothetically speaking, would be willing and able to tender their services to the employer, but it would be the employer who prevents them from doing so. For this reason, the principle of “no work no pay” will not apply.

Reporting – Can an employer require employees to report suspected cases of the CoVID-19 relating to themselves or those they have come into contact with?
Yes.

COVID19 is highly contagious and employers have a duty to maintain a safe workplace and to safeguard the health and safety of their employees. Questions of this nature have a legitimate purpose and may therefore be asked.

Please note, however, that under the Protection of Personal Information Act ("POPI") (which is said to come into effect in April 2020), such information about an employee's health counts as 'special personal information' which may only be processed in limited circumstances. The Information Regulator has issued a guidance note on processing of personal information under COVID-19.

The processing of this information (for instance what and how it will be used and with whom it will be shared – as strictly necessary) should be made clear and employers should ensure that the processing is necessary and appropriate for the stated purpose and is carried out in a proportionate manner. Maintaining the security of the personal data will be fundamental.

Individual employment contracts may permit medical testing. A refusal to undergo a check when there are reasonable grounds for checking the employee's health (for example, they appear ill or have been in a high-risk area) may result in that employee being excluded from the workplace.

Employers must be careful to avoid unlawful discrimination which might arise if (for example) employees with a particular nationality or ethnicity are singled out for checks.

Can employees insist on working from home, even if you (employer) has not implemented this?
Employers have a common-law duty to ensure that the workplace is safe under the Occupational Health and Safety Act (OHSA) and the Compensation for Occupational Injuries and Diseases Act (COIDA).

If employers cannot ensure safety of the employees, they may have a reasonable basis to argue that they should work from home. That will, however, depends on the objective facts whether this is possible.

There is no legal entitlement to work from home. Employees need to get permission from their employer. It's a balancing of rights to render services at work and the employees right to protect health. If an employer says no – employees have to come to work – then that is an instruction.

The employee can be disciplined if they disregard your instruction and if employers have gone through measures to protect workers' safety and health. If there are no Covid-19 cases in the office and extra cleaning measures are taken and they want you to come to the office, then that probably is a reasonable instruction. But if someone at work has Coronavirus and there has not been a deep clean, it becomes more reasonable for the employee to say they will be working from home if this is possible.

Employee – self quarantine
In instances where a reasonable apprehension exists and an employee is self-quarantined, you may decide to regard the absence as a form of 'special leave' in respect of which the employees would be entitled to be paid.

Special leave is not a legislated form of absence and an employer is not legally required to offer such leave. This is because the absence would not be as a result of any of the recognised reasons for employee-absence, such as those listed above. Rather, the reason for the absence is the employer's need and obligation to ensure a safe and healthy work environment.

Listed below are possible scenarios in which an employee would be required to take time off work for reasons related to the COVID-19 outbreak and how these could in turn be dealt with by an employer.
1. Where a reasonable apprehension exists and an employer or an employee requests that such employee self-quarantine as a precautionary measure (which either party ought to do):

Where it is possible for an employee to work remotely: If the employee is able to work, such a request will not be dealt with as a form of leave because the employee will be required to continue to perform her/ his

functions from home and will therefore be entitled to her/ his normal salary and benefits until such time that the self-quarantine period has lapsed.

Where it is NOT possible for an employee to work remotely: Where the employee is not required to attend work, the employer will be required to pay the employee her/ his normal salary and benefits.

An employer cannot force its employees to take unpaid leave in these circumstances and therefore ought to offer special leave, if it is feasible for an employer to do so.

Abuse may be reduced by clearly setting out the circumstances that would create the reasonable apprehension, and by requiring proof of the event that gave rise to this apprehension.

Where a reasonable apprehension does not exist, and an employee requests to self-quarantine as a precautionary measure:

Where there is no reasonable apprehension, an employee's absence would need to be taken as annual leave or unpaid leave. In addition, the extent of time that the employee remains away from work must be reasonable in the circumstances.

Should an employee not attend work for an excessive period in circumstances where there is no reasonable apprehension, the employer will need to take appropriate measures to mitigate against any impact on its business operations. This may include taking disciplinary action against an employee where s/ he fails to obey a reasonable instruction to attend work.

Employers should, however, adopt a cautionary approach in these circumstances and seek legal advice prior to taking any disciplinary action against employees.

Can employees refuse to go to work?

Short answer: No

Long answer: Employees remain obligated to go to work unless instructed otherwise by their employers. Employees who refuse to go to work must have a valid reason for their absence. The mere presence of the Coronavirus in South Africa does not constitute a valid reason to stay away from work.

COIDA and sick leave benefits

The Department of Employment and Labour issued a notice in respect of compensation for occupationally-acquired COVID-19 under the Compensation for Occupational Injuries and Diseases Act (**COIDA**).
This notice deals with occupationally acquired COVID-19 resulting from single or multiple exposures to confirmed case(s) of COVID-19 in the workplace.
The notice states that occupationally-acquired COVID-19 is a disease contracted by an employee, as defined in COIDA, arising out of and in the course of the employee's employment. All employees who contract COVID-19 at their places of employment will accordingly be supported through the Workmen's Compensation Fund (Fund) in accordance with COIDA.
In terms of the notice, occupationally-acquired COVID-19 diagnosis relies on:

- occupational exposure to a known course of COVID-19;
- a reliable diagnosis of COVID-19 as per the WHO guidelines;
- an approved official trip and travel history to countries and/or areas of high risk for COVID-19 on work assignment;
- a presumed high-risk work environment where transmission of COVID-19 is inherently prevalent; and
- a chronological sequence between the work exposure and the development of symptoms.

The notice categorises occupations in accordance with the Guideline discussed above, into very high exposure risk occupations, high exposure risk occupations, medium exposure risk occupations and low exposure risk occupations. Albeit the majority of occupationally-acquired COVID-19 cases will be from higher risk occupations, an employee who is diagnosed with occupationally-acquired COVID-19 in terms of the above, will be liable to benefit.

The benefits available in terms of the notice include inter alia:

- for confirmed cases and where the Compensation Fund has accepted liability, payment of a temporary total disablement benefit from the date of diagnosis up to 30 days;
- medical aid for a period of not more than 30 days from the date of being diagnosed; and
- payment of reasonable burial expenses and widow's and dependent's pensions if an employee dies as a result of the complications of COVID-19.

Importantly, the notice states that the employer will be liable to remunerate the employee where the employee is put into self-quarantine on the recommendation of a medical practitioner. However, in that instance the employee will qualify for the C19 TERS as discussed above. Furthermore, Employees who are entitled to claim in terms of COIDA will not be entitled to the UIF benefits in respect of the C19 TERS.

Can you force your employees to take a Covid-19 test?

Employers can force employees to be tested for the novel coronavirus behind COVID-19 according to the new guidance from South Africa's Information Regulator in order to maintain a safe working environment.

They can ask for specific health information.

- An employee can be barred from the workplace if they refuse to be tested.
- As Covid-19 is a notifiable disease in South Africa, a positive test should automatically be forwarded to health authorities.
- Employers may also be obliged to report employees they think may have Covid-19, with or without a test.

The regulator laid out how personal information can be gathered and processed during the Covid-19 disaster in a "guidance note" that stressed the need for privacy – but laid out many instances in which normal privacy protections can be overridden in a quest to slow the spread of the disease.

Employment contract

An employer can change terms and conditions of employment through consultation and negotiation. A contract can be varied relating to salary reduction, bonus waiver or reduction, compulsory use of annual leave during the lockdown period and so forth.

The point to remember is that there must be consultation with employees and not a unilateral implementation of a change to terms and conditions imposed by the employer. In the event the employer and employee do not reach consensus on the variation of contract, the employer may initiate retrenchment procedures if needed.

During the lockdown, and where practical, the consultative processes can be conducted by e-meetings, e-mails or over the telephone. It is important that agreements reached must be reduced to writing (even confirmation via WhatsApp would suffice if the normal conditions of a binding variation of a contract are met).

ALTERNATIVES TO RETRENCHMENTS

While restructuring and some retrenchments ultimately do appear to be inevitable for most businesses, there are a number of alternatives that practitioners as employers could (and ought) to be considering before embarking on any retrenchment exercises in terms of section 189 of the Labour Relations Act (the "**LRA**").

So, what are the various cost containment measures that employers could be considering as possible retrenchment avoidance mechanisms?

By now, most employees do appreciate the dire situation businesses are facing. It ought to be possible for employers to secure employee consent if the genuine need for the measures being proposed is transparently and openly communicated to them.

Moreover, the proposals must clearly be posited as measures to avoid extensive retrenchment and, for some employers, even their possible insolvency. This will ensure that employees understand the need for compromise and accept that the alternative to what the employer is proposing (i.e., job loss could be far worse for them).

Short Time Work

Many practitioners, despite the sudden economic downturn due to the COVID-19 pandemic, do not wish to retrench their employees due to various reasons; employees working for the practitioner for many years if not decades, loyal and hardworking, have families to financially support as well as other financial responsibilities.

They may consider short time work which means "a temporary reduction in the number of ordinary hours of work owing to reasons including slow business, shortage of raw material, vagaries of weather, breakdown of plant machinery or buildings that are unfit for use or is in danger of becoming fit for use".

Short time work could be implemented subject to following:

- It must be for a temporary period where there is only limited amount of work for an Employee to do. From a financial standpoint, practitioners cannot afford to pay their full staff complement their full-time salaries. The Employee will be working far less hours in a day, or week or month for the practitioner;
- It provides the Employee with the opportunity to still earn an income during the period the COVID-19 pandemic exists.
- The Employee remains an Employee of the practitioner and all the normal contractual obligations and rights of the contract of employment still applies except for the implementation of short time work which has been agreed upon.
- If not provided for in the contract of employment, it cannot be unilaterally imposed on Employees as it will change to working hours and reduction in remuneration.

The practitioner and employee need to agree to the implementation of short time work to avoid retrenchment claim.

Employees must note and be mindful of the fact that short time work is an alternative to retrenchment. If the Employee refuses to agree to short -time work, they must understand that practitioners will have a justifiable reason for implementing short time work due to COVID-19 and that Employees may run the risk of dismissal for operational reasons i.e. retrenchment and perhaps waiving severance pay.

When selecting Employees for short time work, an Employer should apply the same standard of selection criteria used when contemplating dismissal for operational requirements for example, the last in first out (LIFO)

Can Short Time Work be unilaterally imposed on Employees?

Unless short time work is provided for in an Employee's contract of employment, short time work cannot be unilaterally imposed on Employees by the Employer due to the fact that imposing short time work unilaterally entails a change to working hours and reduction in remuneration i.e. a unilateral change to the terms and conditions of employment, which if proved, could amount to an unlawful breach of the employment contract by the Employer.

To avoid retrenchment as well as a claim by the Employee for a change to his or her terms and conditions of employment, the Employee and Employer need to agree to the implementation of short time work. As stated above, short time work cannot be implemented without the consent of the Employee.

In the same manner that consultations must take place with Employees if the Employer is considering retrenchment, Employers must consult with Employees regarding imposing short time work. Employees must note and be mindful of the fact that short time work is an alternative to retrenchment. At the very least during this crisis period, an Employee could earn income rather than be retrenched.

For those Employees who have not been working long periods for their Employers, short time work should be considered as they would not have accumulated enough severance pay at the basic minimum of one week's remuneration for every continuous year worked as per the Basic Conditions of Employment Act 75 of 1997 ("the BCEA") in order to have a nest egg for this crisis period. Accordingly, it is in the interests of the Employee to agree to short time work as finding alternative gainful employment during the period of the COVID-19 pandemic is doubtful.

What happens if an Employee refuses to agree to short time work?

If the Employer has a justifiable reason for implementing short time work, which COVID-19 would be in this instance then Employees may run the risk of dismissal for operational reasons i.e. retrenchment.

What is the method of selecting which Employees will be placed on short time work?

When selecting Employees for short time work, an Employer should apply the same standard of selection criteria used when contemplating dismissal for operational requirements in terms section 189 of the Labour Relations Act 66 of 1995 ("the LRA"). For example, the last in first out rule (LIFO) is often applied in retrenchments and the same method can be applied for identifying which Employees should be placed on short time work. It must be noted however, that this is not the only method that can be applied in these circumstances.

Temporary Layoffs

Another option available to employers to manage the financial burden of COVID-19 pandemic will be the temporary layoff, whereby staff will be in the employ of a practice but will not receive a salary. Again, this will depend on whether it is expressly provided for in the contract of employment.
If the contract of employment does not provide for this, or is silent on the issue, the practitioner may still do so provided that the practitioner first embarks upon a consultation process with the impacted employees pertaining to the practice’s operational requirements, which includes economic reasons.
The outcome of those consultations may result in agreed temporary time off without pay, or retrenchments. The employer will be required to justify its operational imperative to apply temporary or permanent layoffs.

There are no prescribed time periods within which temporary layoffs must be applied. The prevailing circumstances and any agreement achieved with the impacted employees will dictate these time periods. Should the temporary layoffs become indefinite or endure for an unreasonably long period of time, the employer may elect to (permanently) retrench employees.

They will claim money from the Unemployment Insurance Fund but it will not come close to their full salary. A temporary lay-off of employees due to operational circumstances.

The employer may, in such circumstances, give the employees a section 189 notification of possible retrenchment. Then, during the retrenchment consultations, either party may suggest temporary lay-offs as an alternative to retrenchment. This can be implemented where the employees agree to the lay-offs and there is some hope of more work and revenue coming in in the future. In such circumstances, the employees would not be paid, but would still be the company's employees. This would usually be for one to three months and may be extended by agreement.

During this time it is important to note and must be careful not to hire new employees in place of employees who were laid off, as this would indicate that there was no good reason for the lay-offs and the employer could well be forced to pay the employees for the lay-off period.

One may also implement rotational layoff (work only every second week and employees accept no, or reduced levels, of remuneration in the weeks that they aren't working).

Reduction in salary

The most obvious cost-cutting mechanism is persuading employees to agree to a reduction in salary. Many large South African employers, including government itself, have already taken steps to implement salary cut, with the financial pain primarily being taken by the top earning, senior executives.

Rather than simply requiring employees to accept a reduction in salary, employers could also consider implementing an incentive scheme in terms of which employees agree to forego a percentage of their remuneration and for that amount to be invested in a long-term incentive scheme of some nature.

Flexible working – can an employer require employees to work flexibly?

Yes, employers can require employees to work flexibly. This includes asking employees to work from different locations, to work from home or to perform different duties.

Before requiring employees to work flexibly, employers should consider their employment contracts and whether they allow for flexible working. If so, employers can implement flexible working unilaterally.

However, it is always best practice to consult with employees before exercising their rights to implement the changes. During such consultations, employers should listen if employees have personal reasons why they cannot work flexibly and take this into consideration when determining whether or not it will require such employees to work flexibly.

If the employment contracts do not make provision for flexible working and the employer needs employees to work outside the terms of their employment contracts, then it will have to agree the flexible arrangements with the individual employees.

If the individual refuses to agree to these changes then, depending on the circumstances, it may be possible to impose them through a process of dismissal for operational requirements and engagement of employees who are willing to work flexibly, in accordance with the employer's requirements.

Those employees who would prefer to accept the proposed changes could elect to stay with the employer, as an alternative to their dismissal for operational requirements. The employer should take legal advice before proceeding to implement changes without the employee's agreement, and how it ought to go about doing so as it does carry with it a legal risk.

In any event, it is important that the employer can justify the need for flexible working and that it behaved reasonably and proportionately when implementing different working arrangements.

If the reason for flexibility is personal to the employee, in that the employee is at risk of having been infected, then the employer would have good grounds for requiring the employee to work from home, provided their forced removal from the workplace lasts no longer than is necessary and they are provided with support.

RETRENCHMENTS – LAST RESORT

Once the practitioner has considered and explored the possibility of the above alternatives, and employees have either refused to agree to them, or it has become apparent that the above measures will not effectively eliminate the need to restructure, the practitioner may find himself/herself in the position that it has to contemplate the possibility of retrenching employees.

Retrenchment of employees can be a complex process and it is strongly recommended that members seek professional advice and guidance to assist them through the entire process.

If the correct procedures are not followed leading up to a retrenchment, the retrenchment may be considered to be unfair. An employee that feels that he/she was unfairly retrenched, may refer a dispute to the CCMA. The dispute must be referred within 30 days from date of retrenchment. If the dispute is not resolved at conciliation, the employee may refer the dispute to the Labour Court.

It must be remembered that the onus will be on the employer to prove that a genuine operational requirement existed. The employer cannot merely claim that for instance the practice was not making money and as such had to retrench employees; the employer will have to produce evidence of such a financial crisis.

Practitioners must not be under the mistaken impression that retrenching an employee is as simple as issuing a notice of termination of the employment relationship based on the operational requirements of the practice. Another common mistake is to selectively nominate “problem” employees for retrenchment instead of using a fair selection criterion such as the LIFO (Last in First Out) principal recommended by Labour Relations Act (LRA).

The COVID-19 pandemic does not, until we are advised otherwise by our Government via new legislation or temporary regulations, allow for an Employer to skip the retrenchment process set out in the Act and merely retrench employees without due process. It is imperative that the correct processes, rules and regulations as set out in section 189 of the LRA are followed by Employers if they are considering retrenchment.

Small-scale retrenchments are governed by **section 189** of the Labour Relations Act, 1995.

A retrenchment needs to be both substantively and procedurally fair. There should be a valid reason for the retrenchment and the correct procedure should be followed. Compensation of up to 12 months of the employee’s normal remuneration may be awarded for not following a fair procedure and / or retrenching for a fair reason (procedural and substantive fairness).

Your practice has no alternative but to consider retrenchment. What is the process?

In order to ensure fairness towards both employer and employee, it is necessary to better understand

When may an employer retrench employees?

Employers may dismiss employees based on their operational requirement as defined in section 213 of the Labour Relations Act. "Operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer. Employers could safely argue that the impact of COVID-19 on their business negatively impacted its operations on some level.

Operational requirements

Dismissals for operational requirements have been categorised as "no fault" dismissals. In other words, it is not the employee who is responsible for the termination of employment. As a result of its human cost, the Act places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed are treated fairly.

How to dismiss employees based on the operational requirements of the employer?

Section 189 of the Labour Relations Act is applicable and prescribes a joint consensus seeking process in an attempt to reach consensus on appropriate measures (section 189(2)) -

- to avoid the dismissals;
- to minimise the number of dismissals;

- to change the timing of the dismissals; and
- to mitigate the adverse effects of the dismissals;
- the method for selecting the employees to be dismissed; and
- the severance pay for dismissed employees.

Who must the employer consult with (section 189(1))?

The employer must consult with the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

What information must be disclosed to affected employees (section 189(3))?

The employer must issue a **written notice** inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

- the reasons for the proposed dismissals;
- the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
- the number of employees likely to be affected and the job categories in which they are employed;
- the proposed method for selecting which employees to dismiss;
- the time when, or the period during which, the dismissals are likely to take effect;
- the severance pay proposed;
- any assistance that the employer proposes to offer to the employees likely to be dismissed;
- the possibility of the future re-employment of the employees who are dismissed;
- the number of employees employed by the employer; and
- the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.

The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with above, as well as any other matter relating to the proposed dismissals. The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing. If any representation is made in writing, the employer must respond in writing.

At present, there is no legislative framework guiding parties as to how a non-face-to-face consultation should be done, but it is highly recommended that the assistance of a labour law practitioner should be sought and that the process should be a bona fide consensus-seeking one.

How long does this process take?

The duration of the joint consensus seeking process entirely depends on the circumstances such as the reason for the contemplated dismissals, the complexity of the information disclosed and the number of employees affected. Normally on average such a process takes between two and three weeks.

When employer employs more than 50 employees and contemplate dismissing at least 10 employees based on the company's operational requirements.

In such instances the employer will have to follow the steps outlined in section 189A of the Labour Relations Act. For the purpose of this guideline we are not going to discuss section 189 A.

How do I select employees to be retrenched?

Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Section 189(2) requires an employer and the other.

- Consulting parties to engage in a meaningful, joint consensus-seeking process and attempt to reach consensus on the method for selecting the employees to be dismissed.
- After the consultation, the employer must consider and respond to the submissions made by the other consulting parties and, as required by s189(3), must state reasons if it disagrees with the representations.
- Section 189(7) recognises two types of selection criteria that the employer may use to select the
- employees to dismiss:
  - one that has been agreed to by the consulting parties; or
  - one that is fair and objective if no selection criterion has been agreed upon.
- The LRA only facilitates the consultation process and does not prescribe the selection criteria to be used, instead leaving it to the parties to agree on the selection criteria.

- The generally accepted selection criteria according the CCMA Code of Good Practice on Operational Requirements include “last in first out” (LIFO), the length of service, skills and qualifications. LIFO is the criterion associated with the least risk as long as it is fairly applied.
- The employer may opt not to use LIFO, and instead decide on a host of other criteria (for example skills, performance, personal circumstances and family commitments).

What alternatives to a dismissal may be raised by affected employees?

Again, this entirely depends on the circumstances. These are some suggestion that may be made by affected employees in order to save or make more money instead of having to retrench them.

The employer must consider these suggestions and communicate back to the affected employees the reasons for rejecting the suggestions.

The most common mistake made by employers is to not consider alternatives suggested by the affected employees.

It must be remembered that the primary purpose of the joint consensus seeking process is to avoid dismissals and the employer must as such be open to workable alternatives. The dismissal of an employee could be found to be substantively unfair if a reasonable and workable suggestion as alternative to a dismissal was made but the employer outright rejected such a suggestion without justification.

- measures to increase productivity
- short time
- rationalizing costs and expenditure
- increase or decrease in shifts and length of shifts
- decreasing the number of contractors or casual labourers
- using employees to perform the functions performed by contractors or casual labourers
- outsourcing a function to its own staff after the employees have formed themselves into a company
- skills development to enable employees to move into different positions
- stopping overtime or Sunday work
- reducing wages (by agreement)
- early retirement offers or schemes
- moratoriums on hiring new employees
- gradual reduction of workforce by way of natural turnover
- extended unpaid leave or temporary lay-off

How much severance pay?

- Employees are entitled to 1 week’s severance pay for each completed and continuous year of service with the same employer. The employer does not have to pay severance pay if an employee unreasonably refuses to accept an offer of employment with the current employer or another employer (sections 41(2), 41(4) of the Basic Conditions of Employment Act).
- Leave – an amount of money equal to the annual leave, or time off, that has not yet been taken by the employee must be paid out.
- Notice pay instead of working the employee’s notice period -
  - if the employee was employed for less than 6 months, s/he must be paid 1 weeks’ notice pay;
  - if the employee was employed for more than 6 months but less than 1 year, s/he must be paid 2 weeks’ notice pay;
  - if the employee was employed for more than 1 year, s/he must be paid 4 weeks’ notice pay.
- Other pay – depending on the employment contract this would be any pro-rata payment of a bonus, pension and so on.
- Once an employee is retrenched, he/she is entitled to claim unemployment benefits (“UIF”).

Employee unreasonably refuses alternative employment

If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employees statutory right to severance pay is forfeited.

Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee's refusal.

In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the employee's personal circumstances play a greater role.

What remedy does an employee have if s/he has been unfairly retrenched?

- An employee that feels s/he has been unfairly retrenched may refer his/her dispute.
- The employee must refer a dispute to the CCMA or bargaining council within 30 days from date of retrenchment.
- If the dispute is not resolved at conciliation, the employee may refer the dispute to the Labour Court.
- An employee may claim:
  - For the employer to reinstate him/her (with or without back pay).
  - For the employer to re-employ him/her, either in the work in which s/he was employed before the retrenchment or in another reasonably suitable work (without back pay).
  - For the employer to pay compensation to him/her.
- The claim made by the employee must be practically possible. For example, the employee cannot claim for reinstatement or re-employment if the business closed.
- There is a limit on the compensation that may be given to the employee, being a maximum of 12 months, depending on the circumstances