

# COVID-19 PANDEMIC: IMPLICATIONS ON EMPLOYMENT RELATIONS

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## INTRODUCTION

Following the global spread of the coronavirus (“covid-19” or the “disease”), the World Health Organisation declared it a pandemic on the 30th January, 2020 and nations of the world are already taking reactive and proactive measures including social distancing, lockdowns, border closure, etc to curtail the spread of the disease.

Accordingly, many offices have been shut as employees are unable to go to work. Although some businesses have remained virtually open, as their employees continue to work from home, business conducted remotely has continued to decline. Even in cases in which employees are available to work from home, employers are no longer in a position to provide enough work to keep the employees fully engaged. It is also true that it is not every type of work that may be performed effectively on-line. The corresponding adverse pressure on business revenues will mean that businesses may not be able to sustain

current payroll costs. Employers will therefore sooner than later have to take tough decisions on how to manage this challenge which may include offering pay cut to their staff, downsizing, withholding of salary, shutting down and massive retrenchment of non-essential staffs. This trying time which definitely, is going to impact on employment relationships, will be based on the kind of services required by employers and rendered by employees.

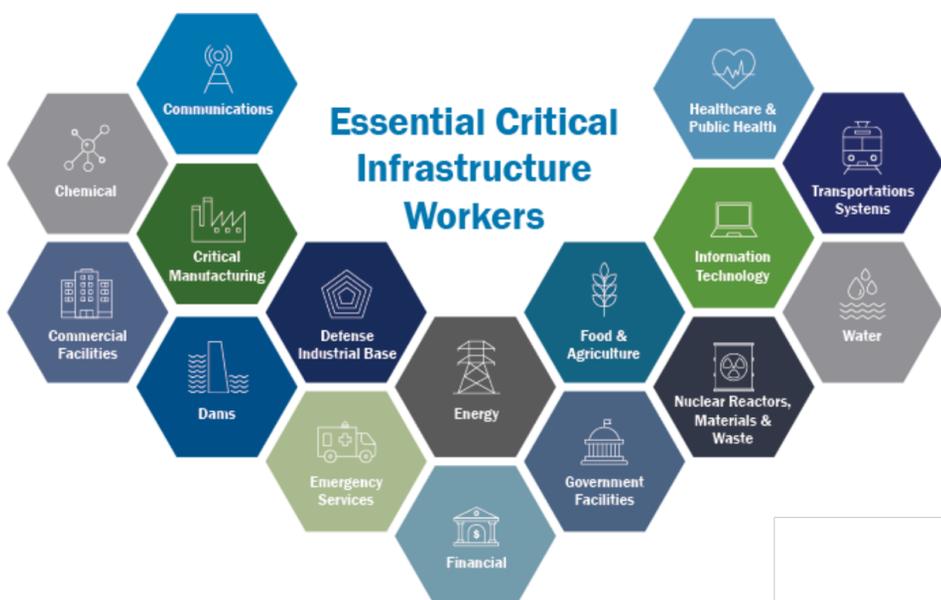
Basically, there are two kinds of services provided by the labour force namely; essential services and non-essential services. Therefore, to understand the impact of the pandemic on employment relations, it is important to distinguish between essential services employments and non-essential services employments.



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## EMPLOYEES PROVIDING ESSENTIAL SERVICES:

Essential services employees fulfil a wide variety of roles in the economy, including health care services, energy provision, food service, agriculture, and transportation. Therefore, this class of employees who are necessary to maintain and sustain life, health and safety are generally excluded from observing the lockdown and other extreme measures in place to curb the pandemic. With the exemption of these employees which allows for them to continue to work and earn, the impact of the pandemic on such employment relations is made radically different from that of employees providing non-essential services.



Firstly, since essential service businesses remain operative and open to employees who continue to go to work, such businesses still make profits enough to maintain remuneration for their employees. Thus, essential services employment relationships are majorly unaffected by the worry of loss of cash flow, remuneration and job insecurity. Notwithstanding, it is pertinent to point out that though this type of employment relationship is likely not to be affected by unemployment or loss of income, as is the case for non-essential business relationships, this class is exposed to some other kind of impact bound to affect their lives, health and safety to which, they must adopt strict preventive measures while on their job.

As essential employees continue to observe and fulfil their duties amid the pandemic from the comfort of their respective offices, the possibility of them contracting the coronavirus disease is high. More so is the risk of them losing their lives. There are already reports of health service workers contracting the virus and dying from same.

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As at 6th April 2020, 16% of the COVID-19 cases reported in Ohio involved health care workers while in Spain at least 12,298 health care workers had tested positive for the disease, Italy has recorded the death of 60 doctors<sup>1</sup> and home here in Nigeria, 3 of the 13 deaths recorded are those of health officials<sup>2</sup> In addition, many essential workers to wit, petrol station attendants, grocery traders and store cashiers etc. experience the cost and risk of maintaining their own health while interacting with the public. In low wage essential jobs, access to health benefits and paid sick leave is now more limited than in normal times.

Besides the risk to life and health, there is the issue of safety. With the extension of the imposed lockdown in places affected, crime is beginning to erupt; causing this class of employees who still move about along lonely streets, roads and alleys, to be easy targets and victims of robberies and other crimes.

The impending threat to the ability for essential workers to continue their jobs safely and effectively becomes more evident every day. Instances of this have been recorded in Lagos and Abuja, Nigeria.

A pertinent question that lingers as it relates to this class of employees is, what happens to them in the likely event that they are exposed to the deadly virus, suffer from its contraction and probably lose their lives? The answer to this question is not farfetched. Relating this scenario to Nigeria, the Employees Compensation Act 2010 becomes the centre of focus.

One of the objectives of this Act is to provide an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out or in the course of the employment.<sup>3</sup> It must be noted that the applicability of this Act is limited only to persons employed in civilian organisations. It does not extend to members of the armed forces of the Federal Republic of Nigeria other than a person employed in a civilian capacity.<sup>4</sup>

1. M. Bellisle; How Many Medical Workers Have Contracted COVID-19? States Lack Key Data in <https://www.opb.org/news/article/coronavirus-covid-19-data-health-care-medical-workers-infection/> [Accessed April 17th 2020]

2. NCDC website

3. Section 1(a) Employee Compensation Act 2010

4. Section 3 Employee Compensation Act 2010

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By virtue of Section 4 of the Employee Compensation Act,<sup>5</sup> essential service workers or their dependants may successfully claim from employers, compensation for any injury, occupational disease and death suffered by such workers in the course of their employment however 14 days' notice from the occurrence or receipt of the information of occurrence must be given to the employer. The notice must contain the name of the employee, the time and place of occurrence and the nature and cause of the disease or injury if known. Failure to provide the above information is a bar to the claim for compensation.<sup>6</sup>

The employer is obliged upon receipt of the notification by the employee to report to the Board and the nearest office of the National Council for Occupational Safety and Health in the State within 7 days.<sup>7</sup> Failure to make the report unless permitted by the Board would constitute an offence under the Act.<sup>8</sup>

The Board may however exempt some minor injuries from being reported.<sup>9</sup>

It is noteworthy that not all injuries suffered by an employee during the period of his employment entitles an employee to compensation. In *Afrab Chem Ltd. v Owoduenyi*,<sup>10</sup> the court held that:

*"It is settled law that it is not every injury suffered by an employee during the period of his work for the employer that entitles the employee to damages or compensation. It is only the injury suffered out of and in the course of his employment that the employer will be liable for. The phrases "out of and in the course of employment" are used conjunctively in the sense that the accident or injury must have occurred not only during the employment but must have occurred 'out of and in 'the course of' the employment. In effect the employment must be the cause of the injury and the injury must have occurred in relation to that employment or incidental to the employment. See St. Helens Colliary Co, Ltd v. Hawitson (1924) AC 59. There must be some causal relationship between the injury sustained and the employment, thus an injury must arise out of and in the course of employment. Any injury sustained by an employee which occurs by a mere coincidence to the currency of the employment cannot be an injury arising out of and in the course of employment. Per WAMBAL, J.C.A. (Pp.31-32, paras.B-B)"*

5. 2010, cap <<<>>, LFN 2010

6. Section 4(4) Employee Compensation Act 2010

7. Section 5 Employee Compensation Act 2010

8. Section 5(5) Employee Compensation Act 2010

9. Section 5(6) Employee Compensation Act 2010

10. (2014) LPELR-23613 (CA)

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From the decision of the court in the abovementioned case, it can be construed that the employer would only be liable where the injury suffered by the employee, occurred out of and was in the course of employment only. Therefore, once an essential services employee can establish that while in the course of his employment, he suffered injury or occupational disease and the employment was the cause of or was incidental to such injury, such employee is entitled to compensation from his employer.

## **EMPLOYEES PROVIDING NON-ESSENTIAL SERVICES.**

This class of employees as stated earlier are those whose services do not impact lives, health, and public safety. By reason of the kind of services rendered, this class is mandated to observe the lockdown and movement restrictions in places affected by COVID-19. Whilst some offices offering this type of employment are completely shut out of doing business some others are resorting to working from home.

In any event, the impact of the pandemic on this type of employment will relate to

the incidences resulting from the observation of the measures in place to fight it.

The International Labour Organization (hereinafter referred to as the Organization) has stated some responses to the pandemic by virtue of the International Labour Standards. Based on the International Labour Standards there are three key pillars to fight COVID-19 and they include:

1. Protect workers in the workplace to minimize the direct effects of the coronavirus, in line with WHO recommendations and guidance;
2. Stimulate the economy and labour demand through economic and employment policies to stabilize economic activity;
3. Protect employment and incomes for enterprises and workers negatively impacted by the indirect effects (factory closures, disruption to supply chains, travel bans, cancellation of public events, etc.)

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The essence of the above is to protect the Labour force and most importantly, non-essential employment relationships from the hazards and incidents of the pandemic. Indeed some countries have keyed into these pillars to preserve the relationship as they possibly can. For example, in America, the Families First Coronavirus Response Act was signed by President Trump on March 18th, 2020. The law mandates employers to provide paid sick leave, paid family and medical leave along with tax credits for the paid leave and expansion of unemployment insurance. The paid leave applies solely to businesses with fewer than 500 employees. Employers with an employee base fewer than 500 until the end of 2020 are obliged to offer employees unpaid leave for ten days, thereafter, paid leave kicks in and employees are compensated with two-third of their regular rate. Employees who are eligible to this provision are those employed for at least thirty days and are unable to work from home.

Germany too, has set up some measures to prevent massive layoffs. Millions of companies in Germany have sent their staff on short-term working schemes known as Kurzarbeit. This scheme sends people home or slashes their work hours substantially but keeps them officially employed with the state funding around two-thirds of their salary.<sup>11</sup> The effect of this is on both the employer and employees. The employer doesn't have the burden of paying salaries nor are the employees in a fix because the State is paying two-third of their salary.

In Nigeria, amidst the fast spread of the pandemic and the search for a solution, Lawmakers are yet to respond to the International Labour Standards and accordingly, there are several questions borne out of the impact of the pandemic that linger around nonessential services employment relations which shall be answered based on the subsisting laws in the Country. These questions include:

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11. A. Weisbach; Germany is Using A Familiar Weapon to Prevent Massive Layoffs in [https://www.cnn.com/2020/04/03/kurzarbeit-germany-is-using-a-familiar-weapon-to-prevent-layoffs.html?\\_source=Facebook](https://www.cnn.com/2020/04/03/kurzarbeit-germany-is-using-a-familiar-weapon-to-prevent-layoffs.html?_source=Facebook) [Accessed April 3rd 2020]

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## 1. WHETHER EMPLOYEES ARE ENTITLED TO REMUNERATION DURING THE LOCKDOWN/ ISOLATION PERIOD?

With the lockdown imposed by the Federal Government and State Governments in affected areas within Nigeria, a lot of businesses, companies, firms and the like have either completely stopped work or resorted to working from home. Regardless of the decision opted for, it is not farfetched that income has grossly reduced and same is starting to pique employers who are beginning to seek out ways to maintain some level of balance between earnings and remuneration of employees. Remuneration simply put is, the total amount an employee receives for performing a service or for being employed by a company or organisation<sup>12</sup> and it is dependent on the conditions and terms of the contract of employment between the employer and employee.

Following the lockdown/isolation period due to COVID-19, some employees have been required to work from home. Where no work is done, is it justifiable to expect

remuneration from the company or organization? The answer to this is found in *Section 7(1)(f) Labour Act 2004*, where the method of calculation of wages is an integral part of the written contract/terms of employment. Thus, where parties agree that wages would only be paid based on work done, the number of days the employee actually works regardless of public holidays or vacations, same will still be obtainable during the lockdown/isolation period. Similarly, where the employment contract does not base remuneration on work done but on employment alone, an employee would be entitled to remuneration without working if he remains employed by the company. The reason is not farfetched- parties are bound by the terms of their agreement. This principle of law is very elementary as employment is a form of contract based on the agreements of the parties involved. This point is justified in the case of *Mohammed M. Alhassan V. Ahmadu Bello University, & ORS (2009) LPELR-8138 (CA)* the Court held that parties are bound by the terms and conditions of the contract of employment between them.

12. J. Kagan; Remuneration in <https://www.investopedia.com/terms/r/remuneration.asp> [Accessed 1st April 2020]

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Hence, in event of breach the court would rely on the contract of employment. Also, in *Union Bank of Nigeria Plc V Soares (2012) LPELR-8018 (CA)* it was held that parties are bound by the terms of the contract where particularly the terms of the contract are clear and unambiguous.

The above cited authorities were decided based on a reasonable scenario and circumstance that the employer is expected to show up at work but not under an unforeseen circumstance as the one we have here where the employee cannot access the place of work in order to fulfil in terms of the contract of employment. Courts are duty bound to interpret the clauses as contained in agreements, it therefore means that in deciding if remuneration should be paid, the contract of employment will be the first point of call.

## 2. WHETHER AN EMPLOYER CAN UNILATERALLY REDUCE EMPLOYEES' REMUNERATION?

Employers grappling with the adverse economic crisis beginning to hit the globe and the unlikely decision of lay-offs also contemplate reduction of salaries this

period until a total revival of the economy is achieved. As stated above, remuneration due to an employee is based on the terms of the agreement reached between both parties. However, by virtue of Section 7(2) Labour Act 2004 an employer is allowed to unilaterally change the terms provided due notice is given not more than one month after the change and a copy of such change is made available or accessible to the employee.

The implication of the above provision is that although the parties agreed on the sum payable as salary, the employer may reduce the salary due to certain circumstances, but the employee must be duly notified.

An example of a standard clause in a contract of employment enabling such reduction may read thus:

*“Remuneration payable for work done will be the sum of Eighty Thousand Naira (N80,000) and payment will be made directly into your designated named account with Access Bank. Changes of the terms and conditions of the contract will be notified to you not later than one month of the change”*

### 3. CAN THE PANDEMIC SERVE AS A GROUND FOR LAYOFF OR TERMINATION OF EMPLOYMENT?

As the coronavirus pandemic subsists, employers are at crossroads as to whether or not employees should be laid off as it may be the only way to keep the organization running. On 20th March 2020, the Indian Ministry of Labour and Employment advised employers to refrain from terminating the employment or deducting the wages of their employees. By virtue of this notification, it may be difficult for employers to lay off employees on the ground of the pandemic and if such is done an action for wrongful termination may be rightly sought by the employee.<sup>13</sup>

Sadly, in Nigeria there is yet to be such recommendations that employees may take advantage of as in the case of India. The relevant statute is silent on the grounds that may warrant the layoff or termination of employment. It is therefore safe to state that employers may rely on the pandemic

were necessary, to lay-off employees. In any event an employer is not obliged to give a reason for such action.

In *Ativie V. Kabelmetal Nig. Limited (2008) LPELR-591 (SC)* the court held that an employer is not bound to give any reason for terminating the employment of an employee where it is not one with statutory flavour. Also, in *Obanye V. Union Bank (2018) LPELR-44702 (SC)* the principle was reiterated to the effect that a private limited liability company or any employer of labour does not have any obligation to retain the services of any unwanted employee and may terminate such employment without a reason.

### 4. IS THE NOTICE OF TERMINATION OF EMPLOYMENT REQUIRED?

By virtue of *Section 11(2) of the Labour Act 2004*, before an employment is terminated there are minimum notice periods expected to be given by either party to the contract of employment. The notice is subject to the duration of employment. The notices to be given as provided in the section are:

13. M. Neerav; Coronavirus Lockdown: What are the Implications for Indian Employers in <https://www.google.com/amp/s/m.businessstoday.in/lite/story/coronavirus-lockdown-covid-19-implications-for-indian-employers/1/400409.html> [Accessed 15th April 2020]

- a. one day, where the contract has continued for a period of three months or less;
- b. one week, where the contract had continued for more than three months but less than two years;
- c. two weeks, where the contract has continued for a period of two years but less than five years; and
- d. one month, where the contract has continued for five years or more.

The provision of notice for termination of employment is not absolute as it can be abridged or waived by either party.

The instant issue been considered however finds its root where there is no agreement of abridgement or waiver by the either of party. Ordinarily, where reasonable notice was not given neither was it waived it would amount to wrongful termination. A party that has been wrongfully terminated from employment may institute an action against the employer for wrongful termination. See *Ali V. CBN & Ors (2016) LPELR-41611(CA)*; *Osisanya v Afribank (Nig.) plc (2007) 6 NWLR part 1031 page 565 at 586*

*Para A-G per Ogbuagu JSC and First Bank of Nigeria Plc v Mmeka (2015) 6 NWLR Part 1456 page 507 Para E - G per Saulawa JCA.*

It is my humble submission that this position of law is still viable regardless of the pandemic. Any contract of employment that is wrongfully terminated may be remedied by an application filed in a court of competent jurisdiction against the offending party. Where the offending party is the employer as far as the contract does not enjoy statutory flavour, the remedy is most likely not to include a reinstatement as the court cannot force a willing employee on an unwilling employer. See: *Okwara Agwu & Ors V. Julius Berger Nigeria Plc (2019) LPELR-47625(SC)*.

A pertinent question related to this issue is, whether notice of termination of employment would run during the period of the lock down/isolation. Section 11 Labour Act 2004 provides for notice to be duly given to the other party before termination. The notices required depending on the duration of employment has been highlighted in previous paragraphs.

This section however does not provide for instances where there is a state of emergency as we are facing now due to the pandemic. It is my view that contracts of employment most likely do not include such a clause. Where such clause is in the contract of employment, the employer would be bound by its content. Where the clause is absent as in most cases, a notice of termination in accordance with the law can run during the lockdown. An action for wrongful termination of employment may most likely fail once it is established that the employee was accorded reasonable notice.

## **5. IS AN EMPLOYER LEGALLY JUSTIFIED FOR DEDUCTING AN EMPLOYEE'S REMUNERATION FOLLOWING SICK LEAVE AMID LOCKDOWN?**

Deduction of remuneration is generally known as a penalty. Following work retirement to the confines of employees' home due to the COVID-19 pandemic, some employers no longer consider an application for sick leave appropriate. In attempting to proffer an answer to the above question, two scenarios would be considered to wit;

- a. Where an employee who has not utilized his/her sick leave prior to the lock-down, applies for same following a health crisis;
- b. Where an employee who has exhausted his/her sick leave currently suffers from a health crisis impairing ability to work during the lock down.

By the provision of Section 16 Labour Act 2004, every employee is entitled to sick leave and to remuneration during that period. Thus in the first scenario, an employee may apply for and is entitled to sick leave and remuneration during this period of lockdown where, prior to same, he/she had not exhausted his/her sick leave. An employer is not allowed in this instant to reject the application and deduct from such employee's remuneration. Where the employer contemplates deduction, it would amount to an illegality if executed because employers are estopped from making any deduction or making any agreement or contract with an employee for any deduction of wages to be paid by the employer to the employee, for or in respect of fines except where it is

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expressly permitted by the Act or any other law.<sup>14</sup> A prior consent in writing must be obtained from an authorised labour officer where the Act permits deduction. By virtue of Section 77 Labour Act 2004, an authorised labour officer is any public officer who is authorised in writing by the Minister or with the consent of the State Authority any officer in the public service of a state.

In the second scenario, where an employee prior to the pandemic had exhausted his/her sick leave but happens to suffer from an illness as Covid-19 which causes such

employee to be absent from employment or unable to render services during the lockdown, it is our view that the employer will also have no legal justification to deduct from the salary payable. This is because, the Act only permits deduction from wages with the consent of the employee for contributions to provident or pension schemes or other schemes agreed to by the employee and approved by the relevant Authority. Absence from work or

inability to fulfil the employment obligations as in this scenario is not an instance permitted by the Act for any deductions of wages. Therefore, any deduction from an employee's salary would be illegal and unjustifiable in law.

## **6. WHETHER EMPLOYEES CAN CLAIM COMPENSATION FOR INJURY SUFFERED DURING LOCKDOWN:**

This question relates to employees who currently work from home. In the event that an employee who works from home during the lockdown suffers injury or dies, can such employee or his/her dependants claim compensation? Interestingly, by the provisions of section 11 of the Employee

Compensation Act 2010, a non-essential service worker may claim entitlement to compensation. The section provides for compensation for injuries occurring outside normal workplace if;

- a. the nature of the business of the employer extends beyond the usual work place;

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b. the nature of the employment is such that the employee is required to work in and out of the workplace; or

c. The employee has the authority or permission of the employer to work outside the normal workplace.

The implication of the above is that employers can still be held liable for compensation of an employee who suffers injury whilst working from home during the lockdown. However, the employee is expected to establish that such injury occurred out of and was in the course of his employment. See: *Afrab Chem Ltd. v Owoduenyi*.

It must also be noted that injury sustained by an employee which occurs by mere coincidence to the currency of the

employment cannot be an injury arising out of and in the course of employment. In *Afrab Chem Ltd. v Owoduenyi* (supra) the court held that:



*"There must be some causal relationship between the injury sustained and the employment, thus an injury must arise out of and in the course of employment. Any injury sustained by an employee which occurs by a mere coincidence to the currency of the employment cannot be an injury arising out of and in the course of employment."*

The above pronouncements take care of unscrupulous employees who wish to rely on the currency of the employments and work from home to claim compensation for injuries coincidentally suffered.

## CONCLUSION

The impact of COVID-19 on employment relations cannot be ascertained fully. However, it is certain that its impact will cut across key dimensions of the relationship. These dimensions have been identified by an assessment of the International Labour Organization to include;

- i. the quantity of jobs (both unemployment and underemployment)

- ii. the quality of work (e.g. wages and access to social protection); and
- iii. specific groups who are more vulnerable to adverse labour market outcomes.<sup>15</sup>

It is therefore suggested that now more than ever, all players within the labour force must work together and begin to devise ways to protect their relationship from the consequences of the necessary measures put in place by the Government to fight the pandemic. More importantly, the Government must also seek out means to cushion the economic effect of the pandemic on companies, organizations and institutions adversely affected in order for them to be able to sustain the financial obligations to their staff. This may be by way of bailout, incentives, tax reliefs etc. By so doing, the negative effect of the pandemic on affected employers will be minimal and will allow for easy discharge of their obligations to their employees.



14. Section 5 Employers Compensation Act 2010