



COVID-19:

Nigerian Labour & Employment FAQs

This article is a sequel to our earlier thought leadership article titled “COVID -19: Managing Legal Risks at the Workplace”.¹ In this edition we drill down to discuss some of the frequently asked questions on key Nigerian employment law relating to the COVID-19² pandemic.

Where we are

The International Labour Organization (ILO) preliminary assessment of the possible impacts of COVID-19 on the world of work, is that the pandemic has already transformed into an economic and labour market shock, impacting not only supply (production of

goods and services) but also demand (consumption and investment). Consequently, all forecasts “point to a significant negative impact on the global economy, at least in the first half of 2020.”³

¹ See COVID -19: Managing Legal Risks at the Workplace” at www.templars-law.com.

² At the last count, over 2,188,194 cases and 147,632 deaths have been reported around the world.

³ COVID-19 and the World of Work: Impact and Policy Responses, ILO Monitor 1st Edition, 18 March 2020 www.ilo.org.

The Frequently Asked Questions

Can the employer unilaterally vary the contract of employment?

The answer is yes, but the process may vary from case to case depending on the nature of the employment relationship.

In unionized employment, the buy in and concurrence of the employees' union, is required and the process stipulated in the collective agreement would need to be followed.

In the case of employees covered by the Labour Act,⁴ the agreement of the employee is generally not required to vary the contract except in the following limited cases: to waive the worker's right to notice of termination;⁵ to defer annual leave with full pay.⁶ However, the Act requires the employer to inform the worker of the nature of the change by a written statement.⁷

Employees not covered by the Labour Act or a collective agreement are strictly governed by their contracts of employment. Generally, the employer is at liberty to vary the contract without recourse to the employee where: (a) the contract contains a variation or flexibility clause; and (b) the right may be implied if the circumstances of the business demands, provided that the employer acts fairly, reasonably, in utmost good faith and the changes do not leave the employee in a

position where he is unable to perform the contract.

Either way, best practices require that the employer notify the employee of the new changes after they have been made and explain the basis for the changes.

Can the employer unilaterally review employee wages, compensation and benefits?

The answer again is yes, but the process may vary from case to case having regard to the nature of the employment relationship.

Some school of thought hold the view that the employer's duty to pay agreed wages⁸ does not permit a unilateral reduction in the employee's wages.⁹ This school of thought rely on the ILO Protection of Wages Convention, 1949 (No. 95) and Section 5(1) of the Labour Act for their position. However, the view is not supported by a literal reading of the text of the Convention and the Act. Pay cuts, suspension or withdrawal of employee compensation and benefits are not among the deductions prohibited.

Can the employer place the employee on temporary unemployment (furlough)?

The concept of furlough¹⁰ is not known to Nigerian employment law. An employee is either in or out of employment and nothing in between. If the employment is not terminated the employer will remain liable to pay the salaries and other entitlements of the

⁴ The Labour Act generally deals with protection of wages, contracts of employment and terms and condition of employment of workers. A worker is a person who has entered a contract of employment for manual labor or clerical work. The Labor Act does not apply to persons exercising administrative, executive, technical or professional functions. **Evans Bros. (Nig.) Publishers Ltd. V. Falaiye** (2003) 13 NWLR (Pt. 838) 564 (CA).

⁵ Section 11(6) of Labour Act.

⁶ Section 18(1)(2) of Labour Act.

⁷ Section 7(1)(2) of Labour Act.

⁸ Article 1 of the ILO Protection of Wages Convention, 1949 (No. 95) defines the term "**wages**" to mean "*remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or*

unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered."

⁹ See Sam Erugo, Ph.D. *Introduction to Nigerian Labour Law*, (2nd Edition, 2019) at page 140-141; **Adebusola Adedayo Omole v. Mainstreet Bank Microfinance Bank Ltd** (Unreported) Judgement of Hon. Justice J. D. Peters, J of the National Industrial Court of Nigeria in Suit No: NICN/LA/341/2012 delivered on 4th March, 2014.

¹⁰ 'Furlough' simply means a temporary lay off or leave of absence from work without pay due to economic conditions affecting a company. In practical terms, furloughed employees are kept on the payroll of the company but without pay instead of being laid off or being made redundant.

employee as long as the employee is willing and makes himself available to work.¹¹

Notwithstanding that furlough is not known to Nigerian employment law an employer can furlough the employee by agreement. Nigerian law recognise the concept of sanctity of contract and accordingly the employer and employee are at liberty to freely and voluntarily enter into a furlough agreement setting out specific terms and conditions of the furlough.

Can the employer unilaterally review employees leave and holiday?

As a general rule, the employee is entitled to paid leave and most contracts of employment typically gives the employer the discretion to determine when an employee can take his leave having regards to the exigencies of the business.

The implication is that the employer reserves the right to cancel or defer leave, or request the employee to take his accrued annual leave during the lockdown where it is impracticable for the employee to perform his duties remotely during the lockdown.

Can there be disciplinary proceedings against an employee for misconduct during the shutdown?

The right of an employer to discipline an erring employee in the interest of the organization or institution is guaranteed. It is well within an employer's right to carry out disciplinary proceedings against an erring employee, during the shutdown. This can be done online by email exchanges, tele-conferencing, online meetings, etc.

If an employee is quarantined during the shutdown, can such information be shared with other employees or third parties?

An employee's health status is considered sensitive data under Nigeria data privacy laws and strict processing of such data will apply.

As a practical matter, processing an employee's personal data would require the explicit (written) consent of the employee – and the specific purpose for which the data is required should be disclosed to the employee. In view of the above, before any employee's health information can be shared with third parties or other employees, it must be with the express permission of the concerned employee. This is to prevent any form of discrimination or likely stigmatization against the employee

Can an employee who has been laid off due to COVID 19 access his or her pension funds?

The Pension Reform Act 2014 specifies the grounds for accessing pension funds by an employee. Under the Act, pension funds of up to 25% can only be accessed by an employee who has voluntarily retired, resigned or has been disengaged from his/her job for up to four months without being able to secure another employment.

Are employees in businesses that have thrived during the coronavirus lockdown be entitled to extra pay and other incentives?

Unless the contract provides otherwise, there is no statutory obligation for the employer to make any extra payment to the employee outside of what has been expressly agreed by the parties. That said, employees with contracts that have bonus provisions can be rest assured that their bonus is guaranteed as most bonuses are typically benchmarked on the business meeting or exceeding its target for the year. It may also be prudent for the employer to provide a number of *ex gratia* incentives to the employees to boost their morale during the lock down but this is entirely at the discretion of the employer.

¹¹ Section 17(1) of the Labour Act

When the stay home order is lifted, can an employee refuse to return to work and insist on continuing to telework out of fear of contracting the virus at the workplace?

This would generally depend on whether or not the employee's fear is genuine and fact based. An employer has the duty to provide a safe system of work for its employees. Therefore, where it is evident that this has not been provided by the employer, the employee would be well within his/her right to insist that adequate measures are taken, and a safe work environment provided by the employer before returning to work. Where adequate safety measures have been taken by the employer and employee continues to refuse to return to work, such actions could be deemed a repudiation of the contract by the employee.

Having regard to the challenges of working at home, can an employee be liable for inadvertent disclosure of the employer's confidential information during teleworking?

An employee's duty to keep his/her employer's information confidential applies

regardless of any challenges arising as a result of teleworking. Anything done otherwise could qualify as breach of confidentiality and ultimately breach of contract and disciplinary action can follow.

Post COVID-19 Outlook

The COVID-19 pandemic has changed the world of work and how far the changes go is any one's guess. Expect employers to start reviewing their contract of employment templates to make provisions for the novel issues thrown up by the pandemic, some of which are discussed in this article. Expect a flurry of litigations as employees, especially unionized employees, push back against some of the actions of employers during and post COVID-19. Expect the National Industrial Court of Nigeria to continue to expound and expand the Nigerian labour and employment jurisprudence as it weighs the actions of employers against the principles of unfair labour practices, international best practices and international best standards in labour and industrial relations.

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