

A photograph of four construction workers on a building site. They are silhouetted against a bright, hazy sky. The workers are carrying large, flat, circular objects (possibly trays or pans) on their heads. The foreground shows a grid of rebar and wooden formwork. The overall tone is warm and industrial.

TEMPLARS

COVID-19:

MANAGING LEGAL RISKS AT THE WORKPLACE

Caution! Caution!! Caution!!!

The World Health Organisation (WHO) finally declared the rapidly spreading coronavirus¹ (COVID 19) as a global pandemic. Judging by the reports around the world, it is safe to expect that Corona virus will change the world of work in dramatic fashion more than AIDS, SARS, EBOLA, H1N1 influenza and Lassa fever did. For now, the primary concerns of the employer are protecting the business from significant economic shocks, safeguarding the health, welfare and job of the employee and getting timely advice and guidance on the key legal issues associated with COVID-19 which may impact the business.

While the potential impact of COVID-19 remains evolving and fluid, it is important to keep in view some of the potential legal risks that employers may have to deal with.

Business reorganization and restructuring risks

Prior to the outbreak of coronavirus, the International Labour Organization (ILO) had projected shortage of jobs (another name for unemployment) in 2020 and the near future not just in Nigeria but globally.² The Central Bank of Nigeria has in its very recent monetary policy measures acknowledged that the coronavirus (COVID-19) pandemic is having significant adverse consequences for both the global and Nigerian economies and has taken steps to cushion the adverse impact of the pandemic.³ The best case scenario of the global impact of coronavirus is that there will be a slowdown in global economic growth although certain pessimist expect another global recession. Either way, the natural reaction for employers in these situations is to reorganize or restructure the business to improve efficiency, reduce hiring and disengage non-performing employees to cut cost. Employers will find outsourcing, fixed term employments and other alternative work arrangements more attractive as they grapple with recovering from the pangs of COVID-19.

The good news is that an employer has a general right to reorganize and restructure the business at a time of economic downturn and inherent in this right is the right to negotiate pay cuts, effect suspension or outright withdrawal of certain employee benefits, freeze promotions, declare redundancy and lay off employees in accordance with their contracts of employment. The not so good news is that employers will have to deal with issues surrounding these measures, which include but are not limited to, negotiating with employees or the employees' unions where unionized, obtaining statutory approvals and consents, working out terminal benefits and payout.

Evolving a safe work culture

Every day, employees die as a result of injuries, diseases or other hazards⁴ at the workplace.⁵ Diseases and infections are spread at the workplace principally by employees, clients, vendors and other visitors who neglect to observe basic personal hygiene in the office, meeting room, lunchroom, toilet and other common areas.

Lord Atkin's neighbour principle⁶ when applied in a work setting means that keeping the workplace safe

¹ At the last count, over 183,000 cases and 7,175 deaths has been reported in 114 countries and territories around the world. The WHO envisages that the virus will spread to all the countries in the world.

² The ILO World Employment and Social Outlook Trends 2020 - https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_734455.pdf

³ Central Bank of Nigeria Circular ref: FPR/DIR/GEN/CIR/07/049 dated March 17, 2010 acknowledged that COVID-19 has already led to unprecedented disruptions in global supply chains, sharp reduction in crude oil prices, turmoil in global stock and financial markets, massive cancellations in sporting, entertainment and business events, lockdown of large swaths of movements of persons in many countries, and intercontinental travel restrictions across critical air routes in the world.

⁴ Workplace hazards include viruses, bacteria, mould, blood and other bodily fluids, harmful plants, sewage, dust, vermin, radiation, exposed wires, stress, accidents, workplace violence, etc.

⁵ The yearly figures are estimated at more than 2.78 million deaths per year and 374 million non-fatal work-related injuries each year. Source: the **International Labour Organization** (ILO), <https://www.ilo.org/global/topics/safety-and-health-at-work/lang-en/index.htm>

⁶ The neighbour principle was developed by Lord Atkin in the English House of Lords in the famous case of **Donoghue v Stevenson** [1932] AC 562 (HL Sc) (aka Snail in the Bottle case) to the effect that one must take reasonable care to avoid acts or omissions that could reasonably be foreseen as likely to injure anyone who was so closely and directly affected by the act.

to avoid injury or transmission of diseases to a “neighbour” is a joint responsibility of the employer and employee. The employer has the responsibility to set the safety ground rules in a well articulated health and safety policy for employees, clients and other visitors that continuously identify and eliminate unsafe practices at the workplace. The employees have the responsibility to observe the ground rules and conduct themselves in the workplace in ways that they do not endanger other employees. Any breach of this golden survival rule poses serious legal risks.

Changing the way we work

Serious consideration must be given to the way we work post COVID-19. The cluster of large number of people in one space from 9-5 lends itself to propagation of infectious diseases. Thanks to rapid globalization, the world had already started moving towards flexible working arrangements such as occasional telework virtual work, and virtual meetings as a more sustainable form of employment. This trend is expected to gain further traction and will be particularly beneficial to the segment of employees that are highly vulnerable such as employees who have visited or returned from an area where the coronavirus is spreading, employees who have symptoms of coronavirus, employees who may be at higher risk of serious illness (e.g. older employees and those with medical conditions such as diabetes, heart and lung disease); and employees who have tested positive to coronavirus.

In response to the coronavirus, Facebook, Google and other leading brands have recently taken the drastic step of asking all their employees to work from home for a number of weeks. Those who are yet to take such drastic measures have however taken conservative measures towards protecting the health of their work force in line with the International Labour Organisation, World Health Organization and national health authorities guidelines, such as; providing routine health education, providing sanitizers across the office, adopting self-isolation and social distancing, minimizing business travels and adopting virtual meetings.

As a practical matter, telework and virtual work raises several recondite issues including how to supervise the employee, billing the employee’s time (in employments with active time sheets culture),

managing clients’ meetings, availability of resources for work (computer, laptop, internet, smart phone, etc.). These issues should be properly considered on a case by case basis to avoid creating a problem while trying to solve another.

Mitigating risks of potential employee claims

Employee compensation claims

As stated earlier, the effect of the neighbor principle is that every employer owes its employees a duty of care to make the workplace safe. To avoid unnecessary risks of corona virus to the employees, the employer is expected to take reasonable preventive measures, including providing proper protective equipment and materials, maintaining the workplace in a healthy and safe condition, ensuring that the operations in the workplace are carried out by the employees in compliance with all safety regulations.

The duty of care which an employer owes its employees are pretty much well settled by the courts but most of these decisions relate to claims for workplace injuries and not workplace diseases. While claims for workplace diseases are uncommon, there’s nothing prohibiting such claims if the employee can prove - (a) that the employer owed a duty of care to the employee; (b) that the employer breached that duty of care; and (c) that the employee suffered damages arising from such breach.

Following the outbreak of coronavirus, the International Labour Organisation, World Health Organisation and public health authorities around the world have laid out clear and detailed guidelines to employers on how to deal with the coronavirus at the workplace.⁷

The pertinent question is whether these guidelines will constitute international labour standards, international best practices and a benchmark for determining the duty of care expected of the employer. Having due regard to the current attitude of the National Industrial Court of Nigeria it is safe to say that these guidelines will be deemed to set a benchmark against which the conduct of the employer in Nigeria are to be measured.⁸

⁷ In 2018, the International Labour Organisation and World Health Organisation jointly published the Occupational Safety and Health in Public Health Emergencies: A manual for protecting health workers and responders to assist organizations and workplaces to better prepare and respond to the outbreak of infectious diseases and other public health emergencies. See also World Health Organization release of 26 February 2020 Version 1.2

<https://www.who.int/emergencies/diseases/novel-coronavirus-2019..>

⁸ See discussion paper titled “Developing Trends in Labour Outsourcing and Triangular Employment: The issues” presented by Hon. Justice Benedict Bakwaph KANYIP, PhD, FNIALS President, National Industrial Court at the 2019 NBA Akure Annual General Conference/Dinner held on 7th of May 2019.

Discrimination claims

In compliance with the International Labour Organisation and World Health Organization guidelines, employers are obligated to isolate from others any employee that is ill or exhibiting symptoms of coronavirus at the workplace, limiting the number of people who have contact with the sick employee and then contact the local health authorities. The employer is further required to put in place measures to identify and manage or regulate the activities of persons who may be at risk of coronavirus. These measures should be implemented without inviting stigma and discrimination into the workplace to the prejudice of the affected employees.

A critical question is whether an employer can terminate an employee on the grounds that the employee is ill or exhibiting symptoms of corona virus or who have conditions that put them at higher risk of serious illness (e.g. diabetes, heart and lung disease, older age) or who is asking to telework. This may not be a valid ground for termination and such termination is likely to be struck down by the court for being discriminatory.

Other than the HIV and AIDS (Anti-Discrimination) Act 2014 there is no other specific legislation regulating discrimination at the workplace on grounds of health. However, discrimination on grounds of health is one of the workplace discrimination recognized and protected under the general provisions of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010. In addition, the African Charter⁹ makes extensive provisions for

protecting employees from discrimination and specifically protects the right of every individual to work under equitable and satisfactory conditions. The court can in appropriate cases award damages and injunction where a case of workplace discrimination is made out by an employee.

Data privacy claims

An employee's health status is sensitive data and strict processing rules of such data will apply. Where the employer proposes to request employees to fill in a health declaration form in order to determine if they pose contamination risk, such measure has to be done in a manner that protects the privacy of the health data of the employee.

As a practical matter, processing an employee's personal data would require the explicit (written consent) of the employee (the data subject) and the specific purpose which the data is required should be disclosed to the employee. Also, anyone who is entrusted with or is in possession of the personal health data of an employee owes a duty of care to the employee and such person is accountable for his/her/its acts and omissions in respect of data processing.¹⁰

The best practice for employers to enhance efficient information management, would be to ensure that such sensitive information are properly and securely warehoused, with access limited to only the organisation's Data Protection Officer.

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⁹ The African Charter on Human and People's Rights is a treaty of the Organization of African Unity which was domesticated into law in Nigeria by the African Charter on Human and People's Rights (Ratification and Enforcement) Act.

¹⁰ See the Nigeria Data Protection Regulation 2019 was issued by the National Information Technology Development Agency (NITDA) pursuant to the National Information Technology Development Agency (NITDA) Act 2007.