A Newsletter on Labour Law and Emerging Trends
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Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

COVID-19 AND THE WORLD OF WORK- THE EMERGING ISSUES

In the face of the Coronavirus (COVID-19) pandemic, which is reported to have recorded over one million cases and over sixty thousand deaths around the world, several countries have been forced to take drastic decisions in a desperate bid to curtail further spread of the virus. The ravaging effect of the COVID-19 has had far reaching implications on the global economy, with several businesses temporarily shut down, movements restricted, and various economic activities placed on hold pending the containment of the virus. The world of work is not exempted. In the workplace, most employers have responded by adopting innovative and flexible approaches to work including remote working, virtual meetings, etc. However, these alterations in work dynamics are not without their limitations. Beyond the setbacks occasioned by lack of adequate infrastructure (work tools, access to constant electricity and internet), several sectors require physical presence of employers and employees to enable the smooth running of their operations and businesses.

Following the cessation of numerous economic activities in several States in Nigeria, many employers are gradually depleting their financial resources in an attempt to sustain the salaries and entitlements of their workforce. With no access to the workplace, and given their present inability to work or generate income, some employers are already taking definitive steps and putting measures in place to manage employment disruptions caused by the COVID-19 related lockdown. Without a doubt, many employers are at a loss on how to sustain their financial obligations or legally manage the situation without necessary laying off their employees, some of whom are presently unable to provide any service to their employers as a result of the lockdown.

In this edition of our newsletter, we have highlighted a few questions that have arisen in respect of the impact of COVID-19 on the workplace, and provided brief insights on measures businesses may consider, taking into consideration the extant statutes, case law and international best practices.

	LEGAL ISSUE	ANSWER
1.	In the wake of the COVID-19 pandemic and its far-reaching reverberating effects on the world of work, what are the measures that businesses/employers	We had, in our newsletter for March 2020, addressed safety and workplace health measures to be taken by businesses. These include deep cleaning of offices, social distancing, and the provision of hand sanitizers, disposable hand towels, face masks, hand-held thermometers (for temperature checks at office entrances) and other protective equipment

	should be taking to stay in business?	especially for businesses exempted in the COVID-19 Regulations, 2020. These, amongst other measures should be strictly adhered to. There has been sustained interest on measures businesses can adopt to keep head above water and meet employment related obligations, even when measures taken to curb the spread of the virus such as lockdown and social distancing have invariably meant the non-performance of contractual obligations. Job losses or pay cuts appear inevitable. These wide ranges of Human Resource solutions businesses may choose from during this pandemic must, however, necessarily take into consideration the economics of staying in business and the legal considerations that may attend upon some of these measures when not properly taken or exercised. Thus, except it is absolutely necessary to cut jobs to survive, businesses should not be looking at cutting jobs or taking any such drastic measures, but should consider looking inward for innovative, long-term solutions to see how best situations can be managed or measures taken to keep the same workforce but – loosely speaking – negotiating a few workable terms relating to pay cut, deferring on increment in salaries, payment of bonuses, promotions, unpaid leave, supplanting the annual leave/vacation of staff with the two/three weeks' lockdown government has imposed and such other measures that may keep the business going with the same workforce. Employers must engage their employees on measures being contemplated. The reason is twin-pronged. The portents are that post-COVID-19, there would likely be an upsurge in employment claims arising from some of the measures businesses would be taking to stay in business. To this end, a business that is barely managing to scale through COVID-19 does not want to be bogged down with a huge portfolio of contingent liabilities arising from employment claims. Secondly, given that a lot of these measures would probably not have followed the proper procedure, there are grim prospects of attendant liabilities in damages where such claims are established in court.
2.	What are the legal considerations that should be taken into account in implementing the measures in I above?	Where, on account of liquidity or capital outlay challenges, the business measures require drastic steps, there are two major legal considerations, one flowing from the other, to be mindful of: First, the measures must be taken strictly in accordance with the terms of engagement. Employment is a contract, and like all written contracts, the decision-making process must be guided by the terms of the contract. Therefore, the conditions and steps prescribed in the contract of employment and the employment manual for terminating employments must be followed strictly.

		Secondly, and in line with the above, employers must be extremely mindful of the emergent jurisprudence in labour and employment law practice and adjudication of same by the National Industrial Court (NIC), and the claims that may arise from wrongful termination of employment or other wrongful steps. The labour courts are not limited to the interpretation of an obsolete Labour Act (made in 1974), which is largely not in tune with socio-economic realities of the present age but have now been empowered by section 254C of the Constitution (as amended) to apply international best labour practices (that is, what obtains abroad), international labour conventions, treaties, etc. International best practices and standards prescribe 'social dialogue', similar to what the NIC terms 'participatory democracy'. Both mean engaging the employees, and not taking decisions unilaterally. This, and nothing less, is expected of employers. For example, British Airways extensively engaged its over 30,000 workforce through the Union (Unite) and negotiated and agreed on an 80% salary (that is, 20% pay cut) for the month of April running through May while the staff are furloughed.
3.	How will COVID-19 affect outsourcing/triangular relationships?	A triangular employment occurs where employees ("*outsourced staff*") of an employer ("*provider*") carry out activities directly for a third party ("*user enterprise*") to whom the provider offers services. Most outsourcing contracts stipulate that the outsourced staff remains the employee of the provider. In such arrangements, the user enterprise pays the outsourcing company (provider) directly for the supply of personnel, and the provider in turn undertakes the responsibility of paying the salaries of the outsourced staff. In light of the restrictive measures imposed by Federal and State Governments and the economic downturn that has resulted from the COVID-19 outbreak, most user enterprises may not require the services of the outsourced staff and may opt to cease all payments in that respect. Many outsourcing contracts may also contain *force majeure* clauses that may, in the advent of the coronavirus, suspend the contract for the time being. That being the case, the provider may have no choice but to terminate the employment of the outsourced staff, being unable to sustain their salaries as well. It is pertinent to note that in appropriate cases, the courts have held both user enterprises and providers as co-employers of an outsourced employee. Consequently, the court has in deserving cases enforced employee rights and awarded damages against a user enterprise and the provider, as co-employers. It is therefore in the best interest of a user

		enterprise to cooperate with the provider to ensure adequate consultation with the outsourced staff with regards to any proposed arrangements pending the containment of the coronavirus. This is to avoid being caught up in any employment claim that may arise as a result of the failure of the provider to legally and properly manage the outsourced employee.
4.	Can employers consider the COVID-19 outbreak as a force majeure event to excuse their inability to perform their contractual obligations.	Force majeure is an event or effect that can be neither anticipated nor controlled. The general effect of a force majeure clause in a contract is that it allows a party or both parties to terminate the contract or to be excused from either part or complete performance of certain or all obligations in the contract. Before an employer can rely on a force majeure event, it is essential that a force majeure clause must exist in the contract and that the force majeure event on which the employer intends to rely (in this case, a pandemic/virus outbreak/government order, etc.), is specified in the contract. Where a force majeure event is provided, employers must consider if they are required by the force majeure clause to: give prompt notice; be excused from nonperformance completely or only during the pendency of the force majeure event; mitigate the impact of the force majeure, etc. Unfortunately, most employment contracts/staff handbooks do not contain a force majeure clause, or in any event, do not specify a pandemic as a force majeure event. In light of the lessons learnt from the COVID-19 pandemic, employers must now consider incorporating a comprehensive force majeure clause into Staff Handbooks and future employment contracts.
5.	What if the employment contract does not contain a force majeure clause?	In the absence of an express force majeure clause to excuse nonperformance of employment obligations, the common law doctrine of frustration may suffice, depending on the circumstances of the employment. A contract is said to be frustrated when a supervening event occurs which so fundamentally affects the performance of a contact that in the eyes of the law, the contract comes to an end and both parties are discharged from any duty to perform the contract. This may be difficult to prove in employment contracts, especially where employees are able to work remotely. The doctrine of frustration will not avail an employer for the mere fact that the contract has become burdensome, difficult or expensive to perform. The above notwithstanding, a more effective option in the circumstance may be to negotiate with the employees, explain the difficulties

		occasioned by the COVID-19 pandemic on the operations and finances of the company, and the need for parties to make certain concessions or modifications to enable both parties sustain the relationship and remain in a position where they can continue to perform certain obligations under the employment contract.
6.	Can employers unilaterally modify the employment contract and impose new conditions that were not stipulated in the existing employment contracts and staff handbooks such as pay cuts, unpaid leave, loss of benefits, etc.?	As stated earlier, the labour law jurisprudence is now flagged with what the NIC and international standards refer to as 'social dialogue' or 'participatory democracy'. In essence, employers can no longer unilaterally make material changes to an employment contract without recourse to their employees, especially in relation to their pecuniary benefits. Accordingly, where the change of the conditions of service envisaged by the employer is such that operates to reduce the economic/contractual benefit of the employee, the law requires that such change should be communicated and negotiated with the employee(s) concerned. Such changes must adequately reflect the interplay of rights and economic perspectives, otherwise, it may be considered as unfair labour practice and thus, unenforceable.
7.	Is it possible to discipline an erring employee who is working remotely?	As employees adjust to the new system of remote working, it is expected that if not carefully managed, some employees may not diligently fulfil their employment related obligations. Consequently, measures may have to be put in place to ensure that employees continue to perform their obligations and conduct themselves in accordance with their employment contracts and workplace policies. However, in disciplining an erring employee, the law requires that the employee must be afforded a fair hearing, and that the disciplinary procedure and incidental sanctions are in accordance with the existing terms of the employment contract/Staff Handbook. The above notwithstanding, it is important for employers, in exercising their disciplinary powers, to take cognizance of the limitations of employees during the lockdown. For instance, employees may be limited in terms of working tools, electricity, internet, mobility, etc. As such, an employer who has not provided working tools such as laptops to employees, should be mindful of disciplining such employees for their inability to fulfil certain obligations for which a laptop is required. In such circumstance, the employer may be deemed to have contributed to the alleged misconduct, in which case, it may be considered as unfair labour practice to punish such employee, for an employer's own shortcoming (that is, failure to provide working tools).
8.	Can an employee's annual leave period be supplanted	It is unlikely that most employment contracts envisaged situations where employees would be compelled to stay at home. Thus,

	with the stay at home/lockdown period imposed by Federal and State Governments in Nigeria?	unilaterally replacing an employee's annual leave with the lockdown period may be considered as a unilateral variation, or imposition of a new contractual term which was not contemplated in the employment contract. Particularly, for employees who have been working from home, this may be considered as an unfair treatment. The Nigerian law now requires that material changes to the terms of an employment contract must be communicated to employees well in advance of when same would be made or implemented. To promote industrial harmony, there should be 'participatory democracy' in which such material changes are mutually negotiated and not imposed on employees. Accordingly, such decisions should not be taken unilaterally or imposed retroactively, instead, it should be negotiated and agreed in advance.
9.	Can an employer layoff its employees during the lockdown period?	Employers have the right to terminate an employment contract at any time. However, in appropriate cases, it may be considered contrary to international labour standards and international best practices, and, therefore, unfair for an employer to terminate the employment of its employee without any reason at all, or a justifiable reason that is connected with the employee's conduct or performance. Where the reason for the layoff is connected to the lockdown and the attendant inability of the employer to fulfil its teeming financial obligations, the employer must ensure that it is able to justify this reason in court, should the need arise. Furthermore, termination of employment must be in accordance with the terms of the employment contract, that is, compliance with stipulated notice and prompt payment of terminal benefits. Where the termination is without notice, the employee's salary in lieu of notice and terminal benefits must be paid contemporaneously with the termination, otherwise the termination may be held to be wrongful.
10.	Can employers declare a redundancy by reason of the COVID-19 outbreak?	Redundancy appears to be a recurring suggestion amongst employers as a measure for managing the conundrum created by the COVID-19 outbreak. Section 20(3) of the Labour Act defines "redundancy" as an involuntary and permanent loss of employment caused by an excess of manpower. In other words, the primary cause of redundancy is excess manpower. As opposed to excess manpower, the current crisis has occasioned the non-performance of employment or contractual obligations by all parties, brought about by the measures of lockdown and social distancing guidelines put in place to curb the spread of a global public

		health crisis. In essence, considering that the resultant effect of the COVID-19 outbreak is not necessarily an excess of manpower, redundancy may not, in the first instance, be the supreme measure for managing the crisis. However, if it must, any employer that intends to declare a redundancy is obligated to comply with the statutory procedure laid down in Section 20 of the Labour Act. Proper consideration must also be given to the provisions of the employment contract or Staff Handbook on redundancy (if any).
11.	Take-aways	The unprecedented crisis having such damaging effects on the world of work was not anticipated or contemplated. Indeed, the world of work may never be the same again. Going forward, there is a need for fresh/further consultations with experts on drawing up or revising further particular terms and definition of terms in employment contracts and manuals of employment, to comprehensively attend to the diverse issues that have arisen sequel to the COVID-19 outbreak. Furthermore, technology is the face of today, and the future. Undoubtedly, the ability of most organisations to sustain their operations during the lockdown, albeit remotely, has been largely as a result of the connectivity and digital transformation of the workplace aided by technology. Unfortunately, not many businesses were prepared for this crisis. Therefore, businesses should be amenable to global workplace trends, and consider adopting innovative and flexible working arrangements such as taking their business online, working remotely and redefining work away from a physical habitat.

These issues are not exhaustive, neither do the answers constitute an in-depth analysis of the legal concepts discussed above. In all, the options to be adopted will depend on the peculiar circumstances of each case and the specific terms of the applicable employment contract. Kindly ensure that you seek the legal advice of your solicitor to ensure that any decision taken with regards to employees in the current crisis is in accordance with the extant labour law jurisprudence and international best practices.

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