Nigeria like most countries is dealing with the COVID-19 pandemic, and governments at the federal and state levels have taken measures to limit the spread of the virus, including directing the shutting down of businesses involved in the provision of non-essential services. In this guidance note we have considered some of the employment and labour law implications of the COVID-19 pandemic.
Are employers required to shut down operations?

Unless required to do so by orders of Federal or State Governments, as is the case in the Federal Capital Territory Abuja, Lagos State and Ogun State, employers can continue to carry on their business operations. Employers must, however, take reasonable measures to protect the health of their employees, such as introducing remote working for employees who are not required to be physically present in the employer’s offices in order to perform their duties.

Employers exempt from the shutdown directives that have been issued as at the date of this update are:

1. hospitals and all related medical establishments;
2. organisations involved in the manufacturing and distribution of health care products and services;
3. organisations involved in food processing, distribution and retail companies;
4. petroleum distribution and retail entities,
5. power generation, transmission and distribution companies; and
6. private security companies.

Can an employer require employees to submit to testing?

The consent of the employee will be required before an employee can be tested. Where the employee refuses to give such consent, and the employer reasonably fears that the employee is infected or may infect other employees, the employer can require the employee to work from home.

What should an employer do when an employee tests positive for COVID-19?

The first step would be for the employer to advise the employee to go home, using precautions that will minimise the spread of the disease, self-isolate, and to contact the Nigeria Centre for Disease Control (“NCDC”) on one of its helplines. In addition, the employer should ensure that other employees who were in contact with the affected employee:

- stop work immediately;
- self-isolate for 14 days or for such other period as may be specified by NCDC.
The office should be shut down in order to prevent the spread of the virus, and disinfected before it is re-opened to other employees and / or to members of the public. In all of this, the employer must ensure that it complies with its obligation to protect the identity of employees who test positive for the virus.

4 Can an employer require employees to utilise their annual leave during this 'stay at home' period?

An employer may require its employees to utilise all or part of their annual leave during this 'stay at home' period. Employees who are required to regard the period as being part of their annual leave cannot, however, be required to work during the period.

5 Can an employer, unilaterally, elect to treat the two week 'stay at home' period announced by the Federal Government as two weeks of unpaid leave that the employer does not have to pay for?

In order to vary the terms of an employment contract an employer is required to obtain the consent of the employee. An employer that unilaterally varies an employment contract runs the risk that such variation / amendment could be successfully challenged, in court, by an aggrieved employee. To mitigate this risk, it is advisable for employers to negotiate and to agree the terms of any salary or other benefits adjustments with their employees. In the event, however, that an employee does not agree to the proposed salary adjustments then the employer may, depending on the circumstances of each case, elect to re-consider the continued employment of any such employee.

6 Do employers need to extend the period of paid sick leave of an infected employee?

This will depend on the terms of the relevant employees' contracts of employment, and on the employer's policy on sick leave. Where the contract of employment or the employer’s policy on sick leave do not offer guidance on this issue then, given the unusual situation created by COVID-19, employers should consider negotiating appropriate extensions of sick leave with their employees – either on a case by case basis or as a general modification of policy.

7 How can employers ensure the productivity of employees working remotely?

A lot will depend on the type of employment, and on the duties of the employees in question. In suitable cases employers may:

1. deploy time tracking applications to monitor the number of hours employees spend on their tasks;
2. assess employees' key performance indicators at stated intervals; or
3. schedule periodic virtual meetings of teams for the purpose of providing updates on assigned tasks.
What can be done in relation to employees that cannot work remotely?

There are certain duties that, with the best of intentions, cannot be carried out remotely. In such cases an employer may:

1. Reach an agreement with the employee for the payment of reduced benefits, for such period when the employee is unable to work remotely;
2. Require the employee to work from the office (where a total lockdown has not been imposed), provided that adequate measures are taken to ensure the safety of the employee;
3. Negotiate the suspension of the relevant employment contract(s);
4. Exercise the right to terminate the contracts of employment of such employees.

What happens if there is a sustained work disruption?

Some measures that employers may consider as a means of mitigating the financial impact on the company of a sustained work disruption include:

1. Downsizing the workforce;
2. Renegotiating employment benefits; or
3. Restructuring the business.

What happens to the employment of expatriate employees who are unable to come into the country?

Employers should review the employment contracts of this category of employees to confirm what options are available to the employer. Depending on the contract such options could include suspending the contract or renegotiating its terms. Employers should also take specific legal advice in relation to whether the inability of an expatriate employee to return to the country can be regarded as having frustrated the employee’s ability to fulfil his or her obligations under the relevant employment contract.

Can an employer stop providing free transportation?

An employer may discontinue the provision of free transportation to its employees where the employer reasonably believes that the continued provision of such transportation could be aiding the spread of the COVID-19 virus. If the employer ceases to provide free transportation, and where such free transportation is one of the benefits that the employer has contracted to provide, then the employer will have to pay the employee a transportation allowance in lieu of access to such transportation.
employer-provided transportation. An employer that elects to continue to provide free transportation to its employees must ensure that it puts protective measures in place to minimise the risk of an employee becoming infected as a result of the continued use of such employer-provided transportation.

Can employees be made redundant?

If a business disruption continues for a sustained period of time, such that an employer is no longer able to maintain its current workforce, an employer may declare a redundancy and render some of its employees redundant. In doing so, an employer must ensure that the employer complies with the provisions of:

1. the contracts of employment of the affected employees;
2. applicable statutory requirements (like the Labour Act), and sector specific requirements such as apply in the financial and oil and industry sectors;
3. applicable collective bargaining agreements with relevant trade unions.

Are temporary layoffs, furloughs and/or reduced work hours open to employers in this period?

Employers can utilise both temporary layoffs and furloughs as an alternative to employee terminations or redundancies during this period. Notwithstanding their ‘temporary’ nature, however, temporary layoffs actually have the effect of terminating the contract of employment and, absent any agreement to the contrary between employer and employee, will trigger the application of any redundancy provisions in an employee’s contract of employment. Furloughs on the other hand are a suspension of employment - either pursuant to provisions in the employee’s contract, or by mutual agreement between employer and employee - and since the contract of employment continues to exist, redundancy provisions will not be triggered. Depending on whether the affected employees are members of a trade union, employers that elect to use these strategies would be required to negotiate...
the terms of the furlough and temporary layoffs with the employee representative(s) of the affected employees and/or trade union officials.

Reduced work hours are also an option for employers to consider. Given that reduced work hours will result in reduced salaries, however, the consent of each employee will be required in order for an employer to be able to utilise this option.

**Would any of the foregoing strategies (temporary layoffs, furloughs and/or reduced work hours) have an effect on employers’ statutory obligations?**

Most of the statutory and other contributions that must be made by employers in relation to their respective employees are determined on the basis of the employees’ remuneration – which means that the adoption of temporary layoffs, furloughs or reduced work hours will inevitably affect the quantum of such employer contributions. Reduced work hours that result in the payment of lower salaries will also result in a reduction in the personal income tax that is withheld from employees’ salaries and remitted to the relevant tax authorities. Temporary layoffs and furloughs would also result in lower remittances to Pension Fund Administrators and other statutory agencies such as the National Housing Fund, the Employees’ Compensation Fund and the Industrial Training Fund. Employers would, therefore, be required to notify the relevant tax authorities, statutory agencies and pension fund administrators of the changes to the remuneration packages of the affected employees.

**Will defined benefits schemes such as gratuity payments be affected by temporary layoffs, furloughs and/or reduced work hours?**

This will depend on the terms of the affected employees’ contracts of employment and on how long the employees in question have been employed. As far as duration of employment goes, in a recent decision of the National Industrial Court the court applied what it termed the “principle of arithmetical approximation” to the case of an employee whose employment fell a few months short of the qualifying criteria, and rounded up the length of the employee’s contract to the nearest year - with the effect that the employee was entitled to the benefit in question. An additional concern that employers may need to address relates to the base pay that would be used for calculating the defined benefits entitlement. Employers would also need to determine whether the temporary layoffs, furloughs or reduced work hours would affect the computation of the qualifying years of service. Another related issue is
that employers would have to determine whether or not to pay out accrued benefits prior to effecting the temporary layoffs and furloughs. Some of the factors that we expect employers to take into consideration in arriving at this decision include the employer's budget, the prevailing circumstances at the time, the cost-benefit analysis of retaining the employee on the payroll, and the likelihood of recalling the employee.

Can employers claw-back redundancy benefits paid to employees whose employments are terminated as a result of the temporary layoffs, if such employees are re-employed at a later date?

An employee whose employment is terminated and to whom redundancy payments have been made, cannot be required to pay back any sums paid by the employer to such employee. This is because the redundancy payments would have been made pursuant to a contract of employment that was terminated as a result of the temporary layoff. 'Recall' contracts of employment entered into following temporary layoffs would be new contracts and, absent specific provisions to the contrary, such contracts would not affect the rights and obligations of the parties under the former contracts that have been terminated.

Conclusion

Employers should continue to evaluate the impact of COVID-19 on their businesses, take lawful measures necessary to protect their business and employees, and seek advice where in doubt.

This guidance note is for general information purposes only and does not constitute legal advice. If you have any questions or require any assistance or clarification on how the subject of this guidance note applies to you or your business, or require employment advice, please contact uubo@uubo.org.