AB LEXMALL ASSOCIATES
BARRISTERS / SOLICITORS / CONSULTANTS

22A Kwodjonaa Avenue,
ARS Estates, East Legon,
Accra.

Phone: +233 302-967-263
Email: info@ablexmall.com
Web: www.ablexmall.com
Digital Address: GD-109-6556

COVID-19 PANDEMIC AND EMPLOYMENT LAW IN GHANA – ISSUES ARISING

INTRODUCTION

The COVID-19 worldwide pandemic ("Crisis Period") has resulted in the imposition of several restrictions including limitations on movement, direct contact with persons, social distancing among others. This has negatively impacted the businesses of several organisations across the world resulting in complete shutdowns and drastic reduction of business profits. In Ghana, the President announced a two-week partial lockdown within some parts of the Greater Accra and Ashanti Regions from 30th of March, 2020. Although the lockdown is important to help curb the spread of the pandemic, it is likely to severely affect businesses and the relationship between the employer and the employee in the workplace. This paper seeks to assess the effect of COVID-19 on employer-employee relationship in Ghana, and how employers and employees can minimize their respective risks.

Do I have to protect employees at the workplace against COVID-19?

The labour laws in Ghana impose an obligation on the employer to provide and maintain a safe working environment devoid of risks to the health of employees to the extent that it is reasonably practicable to do so[1]. An employer who defaults in this obligation commits an offence, and is liable on summary conviction to a fine not exceeding GHC 12,000.00, or to a term of imprisonment not exceeding three years, or to both the fine and the imprisonment[2]. This suggests that an employer owes a duty under the law to provide a safe working environment for their employees, especially during this Crisis Period.

Providing a safe working environment during this Crisis Period may result in the imposition of certain safety measures by the employer. These measures may have adverse cost implications on the bottom line since this may result in an unforeseen increase in operational costs, such as utilities, procurement of safety equipment which may be unbudgeted expenses.

[1] Section 118(1) of Labour Act, 2006 (Act 651)
[2] Section 118(5) of Labour Act, 2006 (Act 651)

What are employers obliged to do to protect the health and safety of their employees during the Crisis Period?

Generally, employers are to ensure that their employees work under satisfactory, safe and healthy conditions. In that regard, employers are to provide and maintain at the workplace a system of work that is safe and without risk to health. To ensure the safety and absence of risks to health in connection with use, handling, storage and transport of articles and substances. Employers are to provide the necessary information, instructions, training and supervision that is relevant and, as much as possible, reasonable for the health and safety at work.

The specific actions that the employer must deploy during this period to ensure a safe working environment may differ from workplace to workplace. The key test is that it must be relevant and reasonable. The World Health Organisation (WHO) Guidelines on COVID-19 is a good starting point. Measures that are deployed by the employer to prevent contamination of the workplace, and to protect the employees from exposure to COVID-19 may differ depending on whether the company is a public-facing company (such a retail shop or a delivery company) or a non-public-facing, back-room-type company (such as a data processing company or the corporate headquarters of a financial institution).

Some practical measures that the employer may adopt include: provision of 'Veronica Buckets' to encourage hand-washing; installation of hand sanitizers at vantage points; and the appointment of a dedicated person to wipe door handles and desk surfaces with alcohol every 30 minutes. Alternatively, an employer may also adopt 'an open door policy' to keep all doors open so that there is minimal touching of surfaces. To further conform to the WHO's recommended social distancing protocols, some employers may have to consider changing the employees' seating arrangements, acquiring additional office space or requesting some employees to work from home.

Can I insist that employees must undergo health-screening before being admitted to the workplace during the Crisis Period?

The right to privacy is guaranteed for every person in Ghana under the 1992 Constitution of Ghana. Therefore, generally speaking, it may be an infringement on the right to privacy of an employee to be forced to undergo temperature checks before being admitted to the work place. However, in view of the Crisis Period, an employer can insist that an employee must undergo some basic health screening before being admitted to the work place. At present, under the WHO Guidelines, a person who has abnormal temperature, a persistent cough and sneezing may have COVID-19. The employer has the right to screen for these symptoms as a condition to admit employees to the workplace. In fact, the employer will be failing in its obligations to provide a safe working environment for its (other) employees if the employer does not screen for COVID-19 before allowing the employee to access the work place because of the risk of infecting other employees.

Therefore, the employer as part of the health & safety measures at the workplace during the Crisis Period may order health checks[3].

How should an employer handle an employee who has COVID-19?

An employee who has contracted or exhibits symptoms of the COVID-19 must not go to work and the employer must not admit such an employee at the work place. Under the Labour Act, an employee is entitled to a reasonable leave period when he/she is absent from work due to sickness. Though the law does not expressly state the number of days, weeks or months an employee maybe entitled to as "sick leave" its however clear that such period shall not be computed as part of the annual leave that the employee is entitled to[4]. In practice the number of days that an employee is entitled to as "sick leave" is determine by the terms of the contract of employment of the said employee. In the absence of clear provisions in the contract of employment or an employee handbook, the employer must seek provisional advice.

Can an employer terminate the contract of employment of an employee who has COVID-19?

Where the employee is temporarily sick, the employer cannot terminate the employment as result of the absence from work. Under section 63 of the Labour Act, *"(1) The employment of a worker shall not be unfairly terminated by the worker's employer if the only reason for the termination is (g) that the worker is temporarily ill or injured and this is certified by a recognised medical practitioner*". However, under Section 15 of the Labour Act, an employer may terminate the contract of employment when the sickness is permanent and/or of a nature that will prevent the employee from engaging in the work[5]. Therefore, the employment contract may be terminated as a result of absence from work due to a protracted sickness or illness which is permanent and/or of a nature that will prevent the employee from engaging in the work.

The Ghanaian Court of Appeal in the case of ***Mamprusi v AGC (Ghana) Ltd, [1997-98] 1 GLR 847,*** discussed the issue of termination of the employment of an employee due to sickness which is of a permanent nature and held that "*for an illness to frustrate or determine a contract of employment, either there should be some permanency about it or it should be of uncertain duration. In the instant case, the plaintiff had been diagnosed to be suffering from TB. Even though TB was curable, it was common knowledge that it took a long time to cure and indeed, the duration of its cure could not be determined with any degree of certainty. In the circumstances, the defendants were entitled to treat the contract of employment as frustrated and therefore determined it.*

[3] Regulation 19(1) of Labour Regulations, 2007.

[4] Section 24 of Labour Act-Sick leave not part of annual leave A period of absence from work allowed owing to sickness, which is certified by a medical practitioner, and which occurs after the commencement of and during annual leave shall not be computed as part of the leave.

[5] Section 15 of Labour Act provides this ground for termination of employment as follows:
"A contract of employment may be terminated, (e) by the employer because of the inability of the worker to carry out work due to(i) sickness or accident"

Accordingly, under both the statutory law and the common law, the defendants' were justified in determining the plaintiff's employment on health grounds."

From the above discussion, an employer can only terminate the contract of employment of an employee who has COVID-19 where it is medically certified that the employee's medical condition may persist beyond a reasonable period or it is unlikely that he or she may recover from the disease anytime soon. COVID-19 is a novel medical condition that does not have any vaccine or cure yet. As the global statistics on COVID-19 have shown, the virus is more likely to persist among the aged and people who have a number of underlying medical conditions.

Additional tests that the courts are likely to consider in arriving at whether a termination as a result of COVID-19 is fair are as follows:

a. Whether the employee's incapacity is of such a nature that it appears likely to continue for such a period that the employee cannot be reasonably expected to perform his obligations under the employment contract.
b. That the employee occupies such a sensitive position that his continued absence is likely to hurt the company in any meaningful way.
c. That the continued absence of the employee will constitute undue hardship to the company.
d. Whether the employee cannot be accommodated in another role they can do despite the ailment.

RATIONALISING THE LABOUR FORCE

The disruptions that COVID-19 has brought may mean that, for some employers, there will have to be some staff rationalisation to be able to survive the pandemic. Rationalisations may mean terminations, forced leave with or without pay, reduced working hours, redundancies etc.

The relationship between the employer and the employee is governed by contract. As a contractual relationship, the terms by which the employer and the employee engage with one another at the workplace is determined by the terms of the contract. Although the parties are free to determine the terms of their relationship at the workplace, the Labour Act provides the basic terms which the parties cannot contract out of.

As a contractual relationship, the employer and the employee can agree mutually to modify their relationship in whatever way they deem fit for as long as they do not contradict the basic standards of the Labour Act. Thus, rationalisation, as enumerated above, may be mutually agreed to by the employer and the employee. For instance, although the employer and the employee may have agreed that working hours span 8am to 5pm from Monday to Friday and at an agreed wage of GHC 5,000 per month, the employer and the employee may mutually agree to change the terms so that the wage for instance may be reduced to GHS 3,000 per month during the Crisis Period.

When the employer and the employee agree mutually, the employer faces little or no risk. As much as possible, therefore, the employer must strive to come to an agreement with the employee on the employer's rationalisation plans.

However, the employee is at liberty to disagree to the rationalisation plans of the employer. For an employer who is hard hit by the ravaging pandemic, the only option to survive may be some labour rationalisation. The employer is equally at liberty to take rationalisation decisions without the consent of the employee or even against the express views of the employee. The decisions of the employer here will be deemed unilateral actions. Since the relationship between the employer and the employee is governed by contract, any unilateral decision of the employer carries the risk of breach of the employment contract. The following are some ideas that employers may consider when they are compelled to take unilateral actions to minimise their risk of legal exposure.

How can an employer take unilateral decisions at the workplace in ways that reduce risk of legal exposure during the crisis period?

To reduce the risk associated with a unilateral action in the workplace during this period, the employer must have taken the unilateral action during a period or an event that affects the performance of the contract of employment. The period or the event must be one that was not caused by either the employer or the employee, and both parties should have had no way of preventing the event. The unilateral decision must be reasonable in its application.

The Crisis Period is an event that affects the performance of obligations at the workplace. The pandemic was not caused by the employer or the employee, and none of the parties had any way of preventing the pandemic. The employer may therefore take unilateral decisions for as long as the decision is reasonable. Here, the employer must be seen to have taken necessary steps as much as possible to accommodate the employee. The employer's actions will likely be excused if inaction on the part of the employer will lead to undue hardship.

Reducing the number of working days of the working week

During this Crisis Period (including the lockdown and self-quarantine requirements) some hotels have seen a reduction of patronage by as much as 95% of pre-pandemic levels. The pandemic has therefore made it such that the employer has no work available for the housekeeping staff, for instance, when they come to work, and the employer has no reasonable expectation as to when the lockdown and self-quarantine advice are going to be lifted. The employer may take the unilateral decision to reduce the working days of the working week as a strategy to survive the crisis.

The decision must however be reasonable. For instance, the decision must be informed by changes in production, service delivery or revenue. In addition, the affected workers must be at a department or a part of the company that is affected by the crisis. For instance, if the hotel is seeing an increased activity at the kitchen as a result of food

deliveries, the employer cannot use the pandemic as a reason to reduce the working days of 'unpopular' kitchen staff.

Reducing salaries during this Crisis Period

Generally, an employer cannot unilaterally reduce the salary of an employee as the salary forms part of the terms of the contract of employment. However, it may become necessary to reduce the salaries of employees since the pandemic fundamentally affects the ability of the employer and the employee to discharge their obligations at the workplace. For a company that is fully dependent on the airline industry for its business, the closure of the airspace in Ghana and the announcement of suspension of services by major airlines will create a cash-flow problem. The company may have to reduce salaries as a way of surviving until the airspace is reopened, and the airline industry bounces back. Here the stark choice will be one of reduced salaries or outright layoffs.

A salary reduction scheme may be implemented in two ways. First, the employee works normal working hours, but the employer takes the decision to unilaterally reduce the salary. Second, the employer reduces the number of hours an employee works, and then pays a reduced salary commensurate with the number of hours worked. In both scenarios, the employer may technically be in breach of the contract of employment. However, the employer may reduce the risk of being found liable for breach of contract if the employer acted reasonably in reducing salaries. For instances where there are not enough available hours to work because of the pandemic, it would be reasonable to reduce the working hours, and pay the employees reduced wages commensurate with the hours worked.

Can an employer require its employees to take their annual leave during the Crisis Period?

In Ghana, usually, the timing for the annual leave of an employee is determined by the employer, taking into consideration the operational needs of the company. It is not surprising that the Labour Act provides further that although every worker is entitled to enjoy an unbroken period of leave, an employer may, in cases of urgent necessity, require a worker to interrupt his or her leave and return to work. In the same vein, an employer may require an employee to take his/her annual leave so as not to interfere with operational needs of the company. Since the pandemic has affected production, service delivery and operations of companies, the company may require that employees take their annual leave during the Crisis Period, and stay at home.

Can an employer impose unpaid leave on its employees during this period?

An employer that is cash-strapped and unable to pay all its employees may compel some employees (usually non-essential staff) to go on an unpaid leave as a way of preventing mass terminations. The employees may be asked to stay home until the crisis is over. The practice here is that once the employer returns to good fortunes, and the employees are recalled, the employer will have to institute appropriate measures to pay the employees the lost wages.

Can an employer terminate the employment of some employees by way of redundancy during the Crisis Period?

Under Section 65 of the Labour Act, a company that is contemplating changes in production or services or undertaking a restricting can declare a redundancy. Thus, a company in the agricultural industry which exports all its products to the European Markets and anticipating reduction in exports as a result of the devastating effect of COVID-19 in the coming months may set in motion a planned termination by reason of redundancy.

Under Ghanaian law, generally redundancies take at least three months to be fully implemented. The Chief Labour Officer will have to be given a three-month notice before the contemplated date for the redundancy. An employer will therefore have to do some forward thinking. If the employer is contemplating termination by reason of redundancy, then the notice to the Chief Labour Officer must be sent forthwith.

FRUSTRATION OF EMPLOYMENT CONTRACT

An unforeseen event or a crisis that fundamentally affects the ability of the employer and the employee to discharge their obligations will clothe either the employer or the employee with the right terminate the employment contract. The event must be one that prevents the employer and the employee from discharging their obligations under the contract of employment for an unascertainable period of time. The event must be one that was not caused, engineered or procured by either of the parties. The crisis or event must be such that the parties had no control over it and the effect on the employment. The decision to terminate the employment contract must be reasonable based on the surrounding circumstances.

Can the COVID-19 pandemic in and of itself constitute a frustrating event so that an employer can terminate an employment contract?

Like other contracts, a contract of employment may be terminated by frustration. Where a supervening event occurs, which is deemed under the law as a frustrating event, then the contract of employment may be terminated as a result of frustration. In ***Barclays Bank (Ghana) Ltd v Sakari, [1997-98] 1 GLR 746***, the Supreme Court held that, under the common law, frustration occurred where an external event of some kind which was not the responsibility of either party rendered further performance of a contract impossible or radically different from what had been contracted for.

The fundamental reason for an employment relationship is that an individual will work in the service of the employer and the employer will pay the employee for the employee's labour. If the employee is unable to work, through no fault of his, then the contract may be frustrated. In the same way, if the employer is unable to provide the work through no fault of the employer, the contract will likewise be deemed frustrated. When the contract is deemed frustrated, both the employee and the employer have not necessarily terminated the contract as the contract is deemed to have come to an end with no further obligations on the part of the parties.

Under the WHO Guidelines on COVID-19, there are certain protocols to be observed to prevent infection and/or spreading of an infection. There is social distancing, regular handwashing, coughing into a tissue, the wearing of face mask, self-quarantine, etc. People are encouraged to work from home as much as possible. Thus, the employer and the employee are not necessarily prevented from discharging their obligations towards each other at the workplace. Where these guidelines can be reasonably incorporated into the workplace, the employment contract cannot be deemed frustrated. A party that terminates the employment contract by reason only of the COVID-19 may open himself up for an action in breach of contract.

Can lockdowns imposed by law during COVID-19 be deemed as a frustrating event and therefore constitute grounds for the employment contract to come to an end?

The President of Ghana has imposed a lockdown on greater Accra metropolitan area and greater Kumasi metropolitan area for two weeks, acting under Imposition of Restrictions Act, 2020. During this period, only clearly defined essential services providers may go to work.

For some category of employers and employees, it has become illegal to go to work by virtue of the lockdown. When it becomes illegal for you to discharge your obligations under an employment contract, the contract is deemed frustrated, and the parties are discharged from any further obligations under the contract. This is especially true where the contract of service is for a specific service and for a specific date. So where you employ the services of a musician to perform a music act on a specific date and on that day the musician is unable to perform the service because the date falls during the lockdown, the contract would have come to an end. The musician will have no further obligation to perform the music act and the hirer has no further obligation to pay for the music act. Generally, no compensation is payable either way for the act falling on a lockdown date.

However, the position in an employment situation will differ slightly. If the period of lockdown is for a specific, well-defined period with an end date, then the lockdown period in and of itself will not be deemed to be a frustrating event. The lockdown only restricts movement outside one's home, but it does not necessarily prevent work. Thus where the employer and the employee can make reasonable adjustments for the work to continue through means such as video-conferencing, email, arranging for work-issued computers to be used at home, etc., the lockdown will not be deemed to be a frustrating event. On the other hand, if the lockdown is for an indefinite and an undefinable period with no reasonable expectations as to when the lockdown will be over, and the employer and employee cannot make reasonable adjustments despite best efforts, then the lockdown will be deemed a frustrating event, and the employment contract will come to an end.

CONCLUSION

The above represents some of the situations that may arise at the workplace during this pandemic crisis period. The situations are not mutually exclusive. One or a combination of these situations may arise within the workplace and the strategies that may be deployed

to deal with the situations may also be a combination of the strategies outlined above. Every workplace is different and the issues that may arise may also differ. Although the difference may seem small to the uninitiated, it may still be material in its effect. As much as possible, the employer must strive to take decisions that are mutually agreed to by both parties. In the unlikely event that the employer and the employee cannot come to a mutual understanding as to how to govern their relationship, then unilateral actions may then be considered with the help of a professional.

DISCLAIMER

This paper is not intended to be legal advice or a solution to any specific legal problem. It is not intended to be relied on by any person or any entity to solve any legal problem(s), but intended only to serve as a source of information. Should you encounter any employment issue during this crisis period either related to the matters discussed here or otherwise, you should seek professional help.