

PAID LEAVE IN THE CONTEXT OF COVID-19



The CoronaVirus (COVID-19) pandemic has necessitated huge changes to business activity all over the world. Several countries have implemented statewide lockdowns to curb the spread of the virus¹. This has inadvertently slowed business activity to the extent that several businesses have suspended operations.

A notable fallout of these actions is their effect on employees. Many have been laid off or had their work suspended without pay while others have taken pay cuts. With respect to the latter class, which is a subset of those who have remained in employment, additional questions abound. One of which is the treatment of employees' rights to paid leave during and after the pandemic.

We have seen initiatives taken by certain countries in this respect. In the United Kingdom for instance, the government has recommended that companies adopt the Working Time (Coronavirus) (Amendment) Regulations 2020 (the "Regulations") in the UK – which provides among other things that:

“Workers who have not taken some or all of their statutory annual leave entitlement due to COVID-19 will be able to carry four weeks of accrued but untaken annual leave over into the next two [2] leave years.”

The United States of America, in response to the pandemic, has enacted the Families First Coronavirus Response Act (FFCRA), 2020 which consists of the Emergency Paid Sick Leave

Act (the “EPSLA”) and Emergency Family and Medical Leave Expansion Act (the “EFMLEA”). The FFCRA seeks to combat workplace effects of COVID-19 by reimbursing American employers that have fewer than 500 employees with tax credits for the cost of providing employees with paid leave taken for specified reasons related to COVID-19. The FFCRA provides direction for the administration of the EPSLA and the EFMLEA which requires that certain employers provide paid sick leave to employees who need to take leave from work for certain specified reasons related to COVID-19.

Nigerian law recognises this right, as such, employers ought to avert their minds to these questions. **Section 18 of the Labour Act** provides that a worker shall be entitled to at least 6 working days of paid leave per month for 12 months of work. Without prejudice to the foregoing provision, it is important to note that the Labour Act only applies to workers employed for manual labour or clerical work. Its provisions do not extend to persons exercising administrative, executive, technical or professional functions and independent contractors. The employment of this category of persons is governed by the contract of employment.

A standard contract of employment provides for issues such as the employee’s job description, date of commencement of employment, salary and remuneration, employee benefits, termination of the contract and employee leave and bonuses.

Therefore, other than those mentioned in the Labour Act, an employee’s right to paid annual leave is largely subject to the terms of the employment contract. If the employment contract has made provisions for the effect of a pandemic and lockdown on the employee’s right to annual leave, then the terms of the contract would apply expressly to the exclusion of any other option. However, from our experience, it is unusual that an employment contract would contain provisions with respect to a pandemic.

Generally, changes to terms of an employment contract cannot be made without due consultation and consent of the employee². Where an employer unilaterally changes the terms of an existing contract of employment, the said contract is effectively terminated. Such changes to the conditions of employment could suffice as constructive dismissal which may entitle the employee to seek compensation (in the form of damages) for the wrongful termination of employment³.

In light of the foregoing, the following options may be considered by employers:

Renegotiation of terms of employment

In order to properly reflect the current exigencies, employers may seek to renegotiate with their employees, the terms of the employment contract with respect to paid annual leave and other contractual benefits. This approach may be adopted for employees who can work remotely and on whom the lockdown may not have far-reaching effects as they would be able to carry out their official duties from any location.

²

³

This will ensure that Nigerian workers can contribute effectively in the national effort against COVID-19 without losing out on their paid annual leave entitlement and other contractual benefits or even losing their jobs, because in the event that an employee rejects the proposed renegotiated terms, the employer may legally terminate the employee's employment.

Conversion of the restriction period to Annual Leave

In addition to the foregoing, an employer may negotiate with its employees to utilise their paid annual leave during this mandatory lockdown period. The employees who are mandated to take the period as being their paid annual leave would not be required to work from home during the period. This may be suitable for employees whose job descriptions require their physical presence and cannot carry out any work for the duration of the lockdown.

Deferral of Annual Leave

Finally, due to the nature of their work, some essential workers may be expected/required to forgo their rights to paid annual leave due to the severity of the pandemic. However, employers may choose to avoid the additional hardship for employees and adopt the same approach employed in the United Kingdom as referenced above.

It is noteworthy that the concept of leave deferral is not foreign to the Nigerian labour system, as evidenced by **Section 18 (2) of the Labour Act** which provides that the annual leave can be deferred by agreement between the employer and employee. Although the scope of the Act is limited in application, deferral of leave is still a constant term in many contracts of employment in Nigeria.

In conclusion, it is necessary that employers consider the question of paid leave for their employees in these times and after the pandemic. The options available should be discussed with employees and the latter should be given options on how they want to set about taking their paid leave. It is necessary that these conversations are clear and the resulting policies are properly documented and seen to be agreed to by each employee.

For further information, please contact:

Oyeniya Immanuel
Senior Associate
niyi@sskohn.com

Oluwadoyinsola Oyeleye
Associate
doyinsolami@sskohn.com

Itoyo Etim
Associate
itoyo@sskohn.com

References:

¹The Federal Government Covid-19 Regulations 2020; Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020; Akwa-Ibom State Quarantine and Restriction of Movement Regulations 2020; Ondo State Dangerous Infectious Diseases (COVID-19) (Emergency Prevention) Regulations, 2020; Edo State Infections Diseases (COVID-19) and Other Related Matters Law, 2020; and Bayelsa State Dangerous Infectious Diseases (COVID-19) (Emergency Prevention) Regulations, 2020.

² The Court of Appeal in *Unity Bank v Olatunji* (2014) LPELR-24027 (CA) stated that the variation of the terms of the contract of employment must be by the mutual agreement of both the employer and the employee. See also Section 7(2) of the Labour Act.

³ See the case of *Miss Ebere Ukoji vs. Standard Alliance Life Assurance Co. Ltd* (Suit No: NICN/LA/48/2012) and the Canadian case of *Farber vs. Royal Trust Company* (1997) 1 S. C. R. 846