



COVID 19 AND EMPLOYMENT MATTERS - FREQUENTLY ASKED QUESTIONS

INTRODUCTION

The emergence of the coronavirus (COVID 19) pandemic has affected lives, households and businesses all over the world. Many businesses are either operating skeletonally or have shut down, finding it impossible to continue to operate due to the impact of the COVID 19 on the economy and in essence, their businesses. As a consequence, the impact of COVID 19 has raised several employment questions from employers and employees which require answers from labour law experts. We have set out in this FAQ, some frequently asked questions posed by clients.



- ***What are the legal ramifications in the event where an employer has refuses or neglects to remit deducted pension contributions to an employee's pension manager?***

The Pension Reform Act 2014, which governs the pension framework and procedure in Nigeria, mandates every employer to deduct from each employee's salary, his or her monthly pension contribution and such employer shall not later than 7 working days from the day the employee's salary is paid to the employee, remit an amount comprising the employee's contribution and the employer's contribution to the employee's pension fund custodian. An employer that fails to either deduct or remit an employee's pension contributions within the prescribed period shall be liable to a penalty of not less than 2% of the total contribution that remains unpaid for each month or part of each month the default continues, in addition to making the remittance already due. The penalty is regarded as a debt owed by the employer to the employee's RSA and recoverable as such.



Employment

- ***Does any statutory body in Nigeria have the power to compel companies or employers to use lockdown days as annual leave days?***

Generally, unless empowered by an enabling law, no statutory body has the authority to compel companies or employers to use lockdown days as annual leave days for employees. This is because under the Nigerian Labour Act, employment is a creation of contract and the provisions of the employment contract would generally provide for an annual leave period. Thus, whether lockdown days may be used as an annual leave period will have to be a subject of engagement between the employer and the employee.

- ***Does the COVID-19 pandemic qualify as a force majeure event? If yes, are employers allowed to use this clause to terminate employment contracts?***

A force majeure event is an unexpected or unforeseeable circumstance that prevents a party to a contract from fulfilling his or her contractual obligations. While it is an implied contractual term under French civil law, it is not an implied term under the common law system which is practiced in Nigeria. Therefore, it is imperative that an employment contract expressly detail events (by including the exact situations that it deems as force majeure such as wars, epidemics, pandemics) which constitute a force majeure event in order to entitle the employer to any force majeure reliefs under the contract (such as the avoidance of liability for non-performance of contractual obligations).

Where the force majeure clause is included in an employee's contract of employment, an employer will still be required to prove that: (i) the claimed event (COVID-19 pandemic) is beyond its reasonable control; (ii) that its ability to perform its obligations under the contract have been prevented or hindered by the pandemic; and (iii) it has taken all reasonable steps to seek to avoid the consequences of the effect of the pandemic on the contract.

It is important to note however, that, the general position of the law is that Nigerian employers are entitled to terminate a contract of employment at any time, however, the employer must give reasons for such termination and an appropriate notice period as stipulated in the Labour Act 2004 or the employment contract as well as settle any and all terminal benefits. The occurrence of force majeure event at the first instance, usually results in a simple suspension of contractual obligations for a stipulated period. Where the force majeure event continues after the stipulated period, the parties may then be entitled to terminate the contract.



- ***As a result of COVID 19 on business operations, can an employer unilaterally change the terms and conditions of employment of an employee?***

Employments are creation of contracts but nevertheless with statutory backing. The Labour Act provides for the possibility of changing the terms and conditions of employment of an employee during the subsistence of an employment. However, the courts have held that any variation to a subsisting employment contract should involve the employee. Where the terms of an employee's contract are changed, the employer is mandated to notify the employee of the new terms in writing. A refusal by the employee to accept the new terms provides the employer a valid reason to terminate the employee's employment.



- ***Does the law permit a bank employer to lay-off staff without notice?***

The law does not permit any Nigerian employer to lay-off any member of its staff without notice unless if allowed under the employment contract between the parties. However, employment contracts usually contain a notice period which employees are entitled to before their employment contracts are terminated. Where this period is not granted, such employee will be entitled to payments in lieu of notice. An employer is also required under the law to give reasons for terminating the employment of an employee and payment in lieu of notice must be paid simultaneously with the termination (where no notice is given) and not at a later date. Where this is not done, the employer is exposed to a possible claim from the employee for unlawful termination of contract.



- ***Can an employment contract be verbal? What are the important clauses to watch out for in an employment contract?***

Generally, the employee's contract should be in writing and must expressly state the terms and conditions as well as the rights and obligations of the employee. Where the employment is initially concluded verbally, the law mandates that such terms be reduced to writing and the written statement given to the employee within three months of the worker's commencement of employment. The terms and conditions of the employment must be structured in such a way that the interests of both the employer and employee are secured. Important clauses to be incorporated include the position the employee is to fill, the obligations of the employee, the employee's salary/emoluments, the duration of the employment contract, force majeure clause, arbitration clause, benefits and severance, termination of employment clause amongst others. Finally, the contract must be signed by both the employer and the employee.

- ***What options are available to an employer whose new employee's resumption date falls during the lockdown period, where the employer's business is adversely affected by the COVID-19 pandemic?***

Where COVID 19 has placed an employer in a situation where a new employee cannot resume his employment on the contractually designated date, the parties may need to renegotiate a new resumption/ commencement date for the contract. However, postponement of the resumption date of the employee will amount to a change in the terms of the employment and the law requires that the employee be informed of such change in writing. Where resumption has been postponed, an employer will only be liable to pay the employee from the period he/ she resumes and commences employment and not for any period before such date. Whether the employer can withdraw a new employee's employment contract due to COVID 19 will depend on the facts of the case and the decision of the courts.

For more specific enquiries, please contact us



Adetayo Adetuyi, LLM
Senior Consultant
T: +234 815 840 2593
E: t.adetuyi@brooksandknights.com



Nnanke Williams, LLM
Senior Consultant
T: +234 813 810 0210
E: n.williams@brooksandknights.com

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Contact Us

BROOKS & KNIGHTS
Legal Consultant

4 Alh Kanike Str, Ikoyi, Lagos
+ 234 813 810 0210
info@brooksandknights.com
www.brooksandknights.com