BACKGROUND

In the face of the present global crisis related to the COVID-19 Pandemic, there is need for some legal clarity regarding the rights and responsibilities of Employers and Employees.

The key reason for this article is to be a legal guide to help employees and employers know the basic legal requirements in order to avoid liability and sinning against the law as it is today. Surely such novel situations trigger legal updates and reform and occasion the passing of new laws (as has already happened in Ghana). The key issue is to be in line with the law under the present circumstance. We hope this article helps all readers get in line with the laws as they are today. We also advise that readers seek specific legal advice from their own lawyers before applying any suggestion here.

Some specific Legal provisions relating to the present COVID-19 situation

a. Article 24 of the 1992 Constitution
b. Sections 9(h), 10(a), 66(2), 119(3), of Labour Law
c. Regulation 18(1) of Labour Regulations LI 1833
d. Section 13, 16 Factories Offices and Shops Act, 1970, ACT 328
e. Sections 30(1) and 51(1)(t), of Factories Offices and Shops Act, 1970, ACT 328

EMPLOYEE RIGHTS AND RESPONSIBILITIES

EMPLOYEE RIGHTS

Staff or Employees have both Rights and Responsibilities under the present law regarding situations like Covid – 19. In Article 24 of the 1992 CONSTITUTION; the following is provided:

Article 24. ECONOMIC RIGHTS

1. Every person has the right to work under satisfactory, safe and healthy conditions, ...

4. Restrictions shall not be placed on the exercise of the right conferred by clause (3) of this article except restrictions prescribed by law and reasonably necessary in the interest of national security or public order or for the protection of the rights and freedoms of others.

In LABOUR LAW, ACT 651, the following is provided:

Section 10—Rights of a Worker.
The rights of a worker include the right to
(a) work under satisfactory, safe and healthy conditions;
(f) receive information relevant to his or her work.

Section 11—Duties of Workers.
Without prejudice to the provisions of this Act, the duties of a worker in any contract of employment or collective agreement, include the duty to:
(d) exercise due care in the execution of assigned work;
(e) obey lawful instructions regarding the organisation and execution of his or her work;
(f) take all reasonable care for the safety and health of fellow workers;
(g) protect the interests of the employer; and

With regard to the present situation of COVID-19, Workers have a right to work under healthy and satisfactorily safe conditions. This means the workplaces must be sufficiently safe from potential infection of any kind for workers to work in those spaces.
Under Section 16 of the Factories Offices and Shops Act, 1970, ACT 328, Companies are legally bound to ensure that “Adequate and suitable washing facilities, conveniently accessible for the use of the persons employed, shall be provided and maintained in a clean and orderly condition in a factory, an office or a shop”. This can be interpreted to mean washing facilities without COVID-19 infection, and indeed provided with the necessary supplies to adequately wash as many times as required in the present COVID-19 situation.

Workers are however subject to any restrictions placed on them under law and must comply with these strictly. Restrictions such as those under the new Imposition of Restrictions Act, 2020 Act 1012 are lawful and applicable to all workers. Any other lawful restrictions which may be imposed pursuant to these laws, such as the Partial Lockdown announced by President Akuffo-Addo are also lawful and binding on all workers.

All workers (except those exempted) are legally bound to respect these restrictions REGARDLESS OF WHAT THEIR EMPLOYERS DEMAND OF THEM. Any worker who is punished for observing the Presidential Orders has a Cause of Action against the person who punished them. Any employer or person who procures a breach of the Presidential Orders places themselves in legal jeopardy.

It is also the legal right of every worker more so under the present COVID-19 situation, to “work under satisfactory, safe and healthy conditions”; and to “receive information relevant to his or her work”. In this context it can be said that information related to COVID-19 issues at the workplace are relevant to work. This means Employees or staff are ENTITLED TO ALL RELEVANT INFORMATION RELATING TO COVID – 19 AS THEY RELATE TO THE WORKPLACE, and Employers are to provide same as a duty.

**EMPLOYEE RESPONSIBILITIES**

Once all the needed information is provided and workspaces are rendered sufficiently safe, workers also have responsibilities which include the exercise of common sense as will be determined under “reasonableness rules” or in simple terms what makes sense under each situation.

Specifically, workers or staff have a duty to “exercise due care in the execution of assigned work” which means every member of staff will be expected to exercise reasonable care and common sense or be liable for failing to do, if such failure causes harm to other people.

In this context for example, if a worker is aware that he has COVID-19, but decides not to inform his employers, but comes to work and proceeds to infect others; even though the employer is vicariously liable, that worker can be held directly or ultimately liable for that gross and deliberate harmful negligence, and be made to pay a price for that one way or the other.

Workers and staff are also to “obey lawful instructions regarding the organisation and execution of his or her work”. In this context, lawful instructions will include Orders under the Imposition of Restrictions Act, and other lawful instructions on any level whether at the workplace or on a national scale. Breaches of such lawful Orders are a breach of law.

Workers and staff are to also “take all reasonable care for the safety and health of fellow workers”. This law in the context of COVID-19, also invokes the ‘reasonableness rules’ and requires every worker to exercise due care for the health and well-being of other workers. This is also why any staff who knowingly, negligently or carelessly causes the infection of others is directly liable under law even if the employer is vicariously liable.

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The Act has been passed and is in force regardless that its constitutionality is being discussed.
Workers and staff are to “protect the interests of the employer”. This means every staff must do all in their power to prevent their employer from legal liability or any jeopardy related to this present situation or any other situation.

In simple terms existing law sufficiently covers the present situation and can be applied in the instances above. Workers and Staff must appreciate that they have rights but also responsibilities, and a duty of care to both their employer and colleague employees.

It is important to note Sub Sections (3) and (4) of Section 118 of The Labour Law, Act 651, which state thus:

3. A worker shall use the safety appliances, fire-fighting equipment and personal protective equipment provided by the employer in compliance with the employer’s instructions.
1. An employer shall not be liable for injury suffered by a worker who contravenes subsection (3) where the injury is caused solely by non-compliance by the worker

Although This provision relates to the use of protective equipment, it can be argued that it applies to safety instructions as well, and to that extent, removes the automatic culpability of an employer if it is proven that the staff/employee was careless and did not observe clear instructions.

OBLIGATIONS OF EMPLOYERS

Employers on the other hand also have Rights and Obligations. Apart from the Constitutional provisions in Article 24, these include obligations stated in Section 9 of Act 651 to “take all practicable steps to ensure that the worker is free from risk of personal injury or damage to his or her health during and in the course of the worker’s employment or while lawfully on the employer’s premises”.

This is clearly applicable to the present COVID-19 situation. Employers must ensure that workplaces are free of COVID-19 or any other infections. Failure to do so will attract legal liability from any persons who may become infected as a result of such failure, refusal or neglect of employers to ensure a clean and safe workplace.

Employers are also to “protect the interests of the workers”. This is applicable to the protection of employment of workers during and after this COVID-19 pandemic. Employers may not use this pandemic as an excuse to unlawfully dispense of the services of workers or reduce wages or emoluments without proper lawful process.

The provisions in Section 118 of Act 651 are also applicable in the present situation. Here the provision of satisfactory, safe and healthy conditions is the “duty” of the employer. There is no derogation from this law. It further states that the employer SHALL (compulsion):-

(a) provide and maintain at the workplace, plant and system of work that are safe and without risk to health;

(c) provide the necessary information, instructions, training and supervision having regard to the age, literacy level and other circumstances of the worker to ensure, so far as is reasonably practicable, the health and safety at work of those other workers engaged on the particular work;

(d) take steps to prevent contamination of the workplaces by, and protect the workers from, toxic gases, noxious substances, vapours, dust, fumes, mists and other substances or materials likely to cause risk to safety or health;

(h) prevent accidents and injury to health arising out of, connected with, or occurring in the course of, work by minimizing the causes of hazards inherent in the working environment.

(5) An employer who, without reasonable excuse, fails to discharge any of the obligations under subsection (1) or (2) commits an offence and is liable on summary conviction to a
fine not exceeding 1000 penalty units or to imprisonment for a term not exceeding 3
years or to both.

Provision in Sections 119 also apply in the present COVID – 19 situation. It states:

**Section 119—Exposure to Imminent Hazards.**

(1) When a worker finds himself or herself in any situation at the workplace which she or he has reasonable cause to believe presents an imminent and serious danger to his or her life, safety or health, the worker shall immediately report this fact to his or her immediate supervisor and remove himself or herself from the situation.

(2) An employer shall not dismiss or terminate the employment of a worker or withhold any remuneration of a worker who has removed himself or herself from a work situation which the worker has reason to believe presents imminent and serious danger to his or her life, safety or health.

(3) An employer shall not require a worker to return to work in circumstances where there is a continuing imminent and serious danger to the life, safety or health of the worker.

When applied to COVID – 19, this may be interpreted as follows:
A worker who has “reasonable cause” or reasonably fears, or is sufficiently informed that there may be the risk of infection, shall report this to his immediate boss “AND REMOVE HIMSELF OR HERSELF FROM THE SITUATION”.
This means a worker can cease working and even leave the workplace if the above situation occurs and should not suffer any punishment for that.
It makes the responsibility of constant information and engagement of workers crucial in these times to prevent staff from invoking this legal provision.

COVID – 19 is serious and also creates some legal uncertainties which unfortunately as with other such situations, usually leads to legal liability down the line, which could be very disruptive and expensive. Employers and employees should therefore take steps to be within the law over this period and ensure they avoid such legal pitfalls. We hope this paper serves as a guide to everyone.

**POTENTIAL EFFECT ON SALARY and EMOLUMENTS**
There is some debate as to the effect of COVID – 19 on the lawful management of salaries emoluments and issues such as leave.

**CONFLICT UNDER PRESENT LAW VIS A VIS PRESIDENTIAL ORDERS**
Under present law, Salaries are untouchable unless on very few specific situations where the employee has given express instruction for the company to make deductions or in the event of a lawful interdiction of the staff.
It is therefore arguable that even under a lawful Presidential Order, a temporary shutdown of a factory does not give legal basis for paying staff a fraction of their salary, even if the shutdown is in the interest of the health of workers.
It is however also arguable that where such an order is pursuant to a Lawful Presidential Order, that triggers a situation where unless the government provides for the payment of salaries for the period of no work (as some governments have done), the Employer may gain an accrued right to at least negotiate a reduction on the pay and emoluments of affected staff.

**MANAGEMENT OPTIONS**
Employer Rights in this context will mostly relate to the options available to them to save their organisations in the face of the stresses caused by COVID-19 and related issues.
It is our view that this will be best managed not strictly or entirely as a legal issue, but preferably more with negotiations. This paper is however a guide to how Employers can avoid legal jeopardy even as they pursue negotiations.
Regarding the present situation of our Laws vis a vis the Presidential Orders, it is our opinion that the best way to manage emoluments is to resort to the following in this order:

1. Negotiations
2. If 1 above fails, Invoke the Principles under the doctrine of Frustration
3. If 2 above is not feasible, Invoke the Principles under the doctrine of Force Majeure

**NEGOTIATIONS**

Best way forward under the present situation will be for workers and employers to negotiate. If the COVID-19 situation continues beyond a few weeks, most employers would not be able to pay staff indefinitely for no work done, with no revenues, and companies will collapse, and everyone will lose. This leaves the parties a few options in their negotiations, either for each to take a hit, agree on Hibernation, or negotiate a Tailor-Made solution which fits their circumstance. These allow them to restore the employment contract after the COVID-19 situation.

**Each take a Hit**
This would be for the parties to agree that beyond a point, both employers and staff will ‘take a hit each’ with both giving up some pay without work, i.e. employers give a fraction of the workers’ pay without workers working; and workers take part pay without working.

**Hibernation**
Negotiations could even stretch to “Hibernation’ where employers mothball operations and ‘Hibernate’ in a way that allows them to save resources and return to production when things normalize. Workers or staff also stop taking pay but retain their employment status so they can return to work when things normalize.

**Tailor-Made Solutions**
No two companies are the same, Employers and Employees are encouraged to negotiate and arrive at a comfortable situation. Each workplace is different, companies have different capabilities structures and resources, so one size would not fit all. The best approach will be for each company to engage its stakeholders from Shareholders and Directors to Management and workers and even clients, and fashion a way out of this which suits their circumstance and best preserves their interests.

No option is easy, but these will be legally sound and binding if properly worked into a good contract.

**INVOKE THE PRINCIPLES UNDER THE DOCTRINE OF FRUSTRATION**

The Doctrine of Frustration is a Doctrine in Contract Law where the occurrence of an act or situation is deemed to have made the performance of the Contract impossible or pointless, to the extent that the parties are effectively discharged from the Contract without legal liability. Frustration is a defense against non-performance of a duty under a contract.

Frustration is not provided for specifically in many contracts, but is automatically triggered if the circumstances permit, it can be challenged by the person who stands to lose.

In Blacks Law Dictionary, it is explained as follows:

“If a party's principal purpose is substantially affected (frustrated) by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated”.

Employers may invoke this legal principle in this situation because COVID – 19 was unforeseen, not the fault of anyone, and rendered the employment contract impossible to fulfill because employers must of grave necessity and under legal injunction cease operations, and allow workers to stay home and not work, and workers cannot be held responsible for their inability to work. This therefore is grounds for employers to invoke the principle of frustration and effectively discharge themselves from their duty to pay workers their salary.
This will be legally sound and effective, but socially and morally challenging. It could affect the Brand and reputation of the employers and the lives of their workers, so it must be considered carefully before it is activated.

It is finally crucial to note that if Frustration is invoked, it will only affect the future, all previously accrued earnings and emoluments due are payable immediately before the contract can be cancelled.

**INVOKING THE PRINCIPLES UNDER THE DOCTRINE OF FORCE MAJEURE**

The doctrine of FORCE MAJEURE works very much like the doctrine of Frustration.

FORCE MAJEURE in Black’s Law Dictionary is defined as

> “An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).”

COVID – 19 could neither have been anticipated or controlled and its effect is global. It qualifies as an Act of Nature and one which sufficiently triggers a Force Majeure situation.

Many Contracts have a Force Majeure Clause which details how parties will respond to such an occurrence, in the absence of a Force Majeure Clause, it is legally sound to declare the contract impossible to perform and therefore effectively discharging parties from their duties under the contract as long as the Force Majeure situation persists or leaves in its wake an insurmountable situation with regard to the contract.

Employers could therefore invoke this doctrine and relieve themselves of the need to pay workers over this period, especially if the workers are NOT salaried, such as workers on Contract or those paid per Job or Assignment. Employers must be mindful here too of their moral standing, Brand reputation and the effect on their workers. The point here is that this is a legally sound option but must be managed carefully.

**GENERAL RECOMMENDATIONS**

1. Employers must appreciate that their legal duties and responsibilities do not terminate even under crises such as COVID – 19.

2. Employers must appreciate however that their decisions will have dire consequences on their companies and also their staff and therefore there is need for careful consideration of options and careful choices.

3. All parties must appreciate that there will be life after COVID – 19 and they will have to live with the consequences of their decisions. Parties must therefore keep the future in mind when they make choices affecting others.

4. Our purpose is to provide legal illumination to guide decision making and avoid pitfalls, each party must seek specific advise on the best way forward.

5. It is useful that the President has made some Orders, but it is not sufficient. In the absence of a clear government support to employers for salaries in times of no revenue, employers have to engage with staff and work out reasonable options which preserve relationships and hopefully their organizations’ moral standing, Corporate and Brand reputations after this crisis.

6. At the least, parties must avoid choices which place them in legal jeopardy after this crisis.

Issued by the Corporate and Industrial Law Team
Lex Praxis Incorporated

Site:  [www.lexpraxis.net](http://www.lexpraxis.net)
Email:  service@lexpraxis.net