DOING BUSINESS IN TRINIDAD AND TOBAGO

COVID-19
FAQS FOR EMPLOYERS

The outbreak of the Covid-19 coronavirus has presented new challenges for employers. We have collated below responses to some Frequently Asked Questions that you might have.

It is important to note that the current situation is dynamic and uncertain. This is particularly true in Trinidad and Tobago, because much of our employment requirements are determined, not by legislation or regulation, but by the principles of 'good industrial relations practice'. These principles are not codified, but instead must be gleaned from decisions of our Industrial Court. There is, understandably, little precedent for the current situation.

It is difficult to conclusively predict the view that the Industrial Court, looking at an employer's actions with the benefit of hindsight, might take. However, we have attempted to set out below our understanding and recommendations, based on the situation as it currently stands. This situation may change on short notice. While we will do our best to keep you updated on developments as they arise, please contact us before relying on the contents of this FAQ, or if you require any specific assistance.

HEALTH AND SAFETY

What health and safety obligations do employers have?

Employers have a general duty under the Occupational Health and Safety Act and the common law to ensure the health, safety and welfare of all employees at work. The Occupational Safety and Health Authority has helpfully issued written Covid-19 Guidelines for Employers and Businesses, which can be accessed at this link: OSHA Covid-19 Guidelines.

LEAVE

Are employees entitled to paid Sick Leave -

A. Generally? The legislative provisions governing sick leave in Trinidad and Tobago are limited. In the public sector, provisions governing sick leave are set out in the individual pieces of legislation that deal with each service[1]. In the private sector, a handful of industries[2] are governed by Minimum Wages Orders which entitle employees in those industries to a prescribed amount of paid sick leave.

For all other employees, sick leave is governed by the provisions of the employment contract, policy or (where the employer is unionised) collective agreement. However, because public sector and minimum wages legislation generally provide for 14 days paid sick leave per year, many private sector employers have used this as a guide in crafting their own policies. The way in which sick leave operates in practice, including

[1] The Civil Service Act, Police Service Act and Fire Service Act
[2] Restaurants and Catering, Shop Assistants, Household Assistants

notification, certification and approval requirements, is generally governed by the employment contract, policy or collective agreement and the principles of good industrial relations practice.

In deciding what its obligations are in respect of employee sick leave arising out of the Covid-19 coronavirus outbreak, an employer should first start by checking what its employment contracts, policies and collective agreements say. However, it is important to note that in the current situation good industrial relations practice may require employers to apply those provisions more **flexibly**, **reasonably** and **compassionately** than they would during normal business operations, and that the position may vary depending on the individual circumstances of each employee.

B. If they have been diagnosed with Covid-19? Yes, in accordance with the employment contract, policy or collective agreement.

C. After they have exhausted their contractual paid sick leave entitlements? There is no express legal obligation to provide paid sick leave over and above an employee's contractual entitlement. However, it may be considered a breach of good industrial relations practice to penalise an employee by non-payment of salary, in the current circumstances. Employers should exercise their discretion flexibly, reasonably and compassionately.

D. If they have been placed under quarantine by health officials? This may not expressly qualify as 'sick leave' under the employment contract, policy or collective agreement. However, if an employee is mandated or recommended by health officials to stay away from work, it is likely to be considered a breach of good industrial relations practice to penalise them by non-payment of salary - at least in the short term. If circumstances become protracted, different considerations may apply. These are discussed further below.

E. If they have been asked by their employer not to report to work? This may not expressly qualify as 'sick leave' under the employment contract, policy or collective agreement. However, if an employee is mandated by their employer to stay away from work, it is likely to be considered a breach of good industrial relations practice to penalise them by non-payment of salary - at least in the short term. If circumstances become protracted, different considerations may apply. These are discussed further below.

F. If they are unable to make alternative childcare arrangements? All schools and places of learning in Trinidad and Tobago have been mandated to remain closed until 20th April 2020. As a result, many employees may request time off to stay home with their children. This may not expressly qualify as 'sick leave' under the employment contract, policy or collective agreement. However, depending on the individual circumstances of each case, it may be considered a breach of good industrial relations practice to penalise an employee by non-payment of salary.

On 15th March 2020, the Ministry of Labour issued guidelines to employers on the closure of schools, which can be accessed at this link: Workplace Guidelines On The Closure of Schools

They include the following:

- Parents are encouraged to use their support systems in the first instance to take care of their children to allow them to report for duty.

- Where there are both parents in a family, one parent is encouraged to stay at home with the children whilst the other reports for duty.

- Where alternative work arrangements cannot be made, the employee is to be allowed to stay at home with his/her children without being penalized by either disciplinary action or by non-payment of salary.

While these guidelines do not automatically have the force of law, they are a useful guide in determining what good industrial relations practice requires.

It is important to note however, that the guidelines were issued immediately after the government's decisions to close schools for a preliminary period of one week, and *before* schools were closed until 20th April 2020. They do not, in our view, automatically entitle all parents to paid time off until 20th April 2020. Rather, they suggest that alternative childcare and/or work arrangements should be explored, and that paid leave should be extended only if no other reasonable alternatives are available, bearing in mind the general obligation of employers to act flexibly, reasonably and compassionately, while balancing the operational needs of the business.

What is 'Pandemic Leave'?

In its 15th March 2020 guidelines, the Ministry of Labour directed that:

"For the duration of the COVID-19 Pandemic employers are required to implement Pandemic Leave provisions within their organizations in a compassionate manner which ensures business continuity whilst securing the national interest."

As noted above, while these guidelines do not automatically have the force of law, they are a useful guide in determining what good industrial relations practice requires. Unfortunately, the Ministry did not provide any guidance clarifying what, if any, specific pandemic leave provisions employers are required to make. In our view, 'pandemic leave' can be broadly understood to mean any leave that may be triggered directly or indirectly by the Covid-19 coronavirus outbreak, for which there are no existing provisions under the employment contract, policy or collective agreement. In the absence of any further clarification from the Ministry, we are of the view that the leave discussed under categories **(c)** to **(f)** above, would fall under the umbrella of 'pandemic leave'.

While it does not provide specifics, the Ministry's guidelines do underscore the need for employers to act flexibly, reasonably and compassionately, while balancing the operational, business and financial challenges of the current situation.

DEALING WITH A DOWNTURN IN BUSINESS

Many businesses are already feeling the impact of the current situation. This impact is likely to increase if and when the situation becomes protracted. What options are available to employers to deal with a downturn in business due to supply chain issues, decreased demand for their goods or services or other issues relating to the Covid-19 coronavirus outbreak?

A. Can employees be asked to take vacation leave?

The legislative provisions governing vacation leave in Trinidad and Tobago are limited. In the public sector, provisions governing sick leave are set out in the individual pieces of legislation that deal with each service[3]. In the private sector, a handful of industries[4] are governed by Minimum Wages Orders which entitle employees in those industries to a prescribed amount of paid vacation leave. For all other employees, vacation leave is governed by the provisions of the employment contract, policy or collective agreement and good industrial relations practice.

As a matter of good industrial relations practice, vacation leave is seen as an earned entitlement that employees become entitled to after putting in an agreed amount of service. While employees are generally afforded the flexibility to decide when and how they wish to utilise their vacation leave, this is always subject to the underlying demands of the employer's business. An employer must, however, exercise its rights reasonably and in keeping with good industrial relations practice. A unilateral mandate that employees utilise their vacation leave, particularly if issued on short notice, could potentially be considered to be a breach of good industrial relations practice. An employer should ideally consult with its employees and obtain their agreement to take vacation leave. Many employees may be prepared to do so, particularly where the alternative is the implementation of one of the more drastic measures outlined below. Indeed, alternatives like the utilisation of vacation leave should be considered before implementing any of these other more drastic measures.

B. Can employees' salary or paid working hours be reduced?

As a general rule, the terms and conditions of employment can only be varied by mutual agreement between both employer and employee. A unilateral variation of the terms and conditions of employment by an employer will not be valid unless and until the employee has consented to it. Where an employer purports to unilaterally vary the terms and conditions of employment, this may amount to what is known as a 'repudiatory breach' of the employment contract and/or conduct deemed to be harsh, oppressive or contrary to the principles of good industrial relations practice An employee may 'accept' a repudiatory breach by resigning. In such a case he can claim constructive dismissal as in law the contract would be deemed to have been terminated by the employer's initial repudiatory breach (and not the employee's acceptance of it by resigning). It is not every breach or the variation of every term that will be considered a repudiatory breach, but only those that are 'essential' or 'material'. However, a variation that negatively impacts on an employee's basic remuneration, whether directly by a reduction in salary, or indirectly by a reduction in paid working hours, will be considered a breach of an essential or material term and amount to a repudiatory breach of the employment contract.

[3] The Civil Service Act, Police Service Act and Fire Service Act
[4] Restaurants and Catering, Shop Assistants, Household Assistants

In order to implement such a change, an employer must therefore consult and obtain the employees' agreement. Employees may be open to doing so in the current situation, particularly where the alternative is one of the more drastic measures outlined below. Indeed, alternatives like a reduction in salary or paid working hours, should be considered before implementing any of these other more drastic measures.

C. Can employees be placed on no-pay leave, 'furloughed' or temporarily laid off?

For the reasons outlined above, the unilateral imposition of no-pay leave will be considered a repudiatory breach of the employment contract and conduct deemed to be harsh, oppressive or contrary to the principles of good industrial relations practice.

However, the Industrial Court has recognised temporary lay-offs as a valid industrial relations practice. Many of the Judgments dealing with temporary lay-offs are of some vintage. In more recent times, the Court has placed greater emphasis on pre-consultation, at least in redundancy/retrenchment cases, and in our view it is likely to adopt a similar approach in any new temporary lay-off cases that come before it. In these circumstances, we note as follows:

- The Court has recognised temporary lay-offs as a valid industrial relations practice. However, it has held that a decision to temporarily lay-off employees should not be abused, made whimsically or result from the employer's own poor management. Should a decision to temporarily lay-off employees be challenged at the Industrial Court, it would be important for the employer to be able to demonstrate to the Court, with evidence, that the decision was genuine, properly thought out, and necessitated by circumstances that were outside of its control. In these circumstances, it would advisable for an employer, before embarking on any temporary lay-off exercise, to prepare a comprehensive written business justification setting out why a temporary-lay off is necessary.

- In the event that circumstances require the temporary lay-off of only a portion of the workforce, it would be important for the employer to demonstrate that it utilised objective and fair selection criteria in order to select which employees would be laid off. 'Last In First Out All Things Being Equal' is the accepted standard in redundancy/retrenchment cases and can also be applied to a temporary lay-off. The employer should also consider alternatives to a temporary lay-off, such those discussed above, before making its decision.

- Pre-consultation can be difficult to manage, given that a decision may need to be made within a relatively short time frame. However, at minimum employees should be kept up to date on what the employers' plans are, be given an opportunity to be heard and provided with as much notice of the decision as is practicable in the circumstances. Utilising a progressive approach, where alternative options are considered and implemented before a temporary lay-off, and maintaining open communication with employees throughout the process, is recommended.

- The Industrial Court has held that a temporary lay-off must be for a 'reasonable' duration and cannot be indefinite. If it is possible to give the employees advance notice of how long the temporary lay-off will last, then this would be ideal. If this is not possible due to the uncertainty of the surrounding circumstances and

the employees are sent home without a set return date, the onus is on the employer to keep them informed and provide periodic status updates. The Court has held that, as a general rule of thumb, a temporary lay-off should not last longer than three months, save in exceptional circumstances. Where it does, then the employees may be entitled to claim constructive dismissal.

- In a unionised environment, the collective agreement may contain additional requirements that employers are required to follow.

- Employees are not paid during a temporary lay-off.

- No formal notice to the Ministry of Labour is required.

D. Can employers implement a workforce reduction?

As a general rule, employers can validly terminate employees on the grounds of redundancy where they are 'surplus' to the operational needs of the business.

The requirements governing terminations for redundancy (and for terminating employees in general) in Trinidad and Tobago are not straightforward and are beyond the scope of this FAQ.

However, in general an employer must (a) be able to prove, with cogent evidence, that the terminated employees are genuinely surplus to the needs of the business (b) follow a process that is fair and in compliance with the principles of good industrial relations practice and the requirements of the Industrial Court (c) comply with the Notice requirements set out in the Retrenchment and Severance Benefits Act and (d) pay statutory severance. In a unionised environment, the collective agreement may contain additional requirements that employers are required to follow.

As a general rule, termination is viewed by the Industrial Court as a last resort. While it is not an absolute requirement, utilising a progressive approach, whereby alternative options are considered and implemented before a decision is made to permanently reduce the workforce, is strongly recommended.

MISCELLANEOUS

Overtime: While many businesses may be experiencing a downturn, the demand for certain products and services, such as groceries and pharmacies, may have increased. Employees earning up to 1.5 times the minimum hourly wage (or up to TT$26.25) are entitled to overtime calculated in accordance with a prescribed statutory formula set out in the Minimum Wages (Amendment) Order 2019 (MWO). For employees earning more than this sum, there are no prescribed legislative requirements, and it will depend on the provisions of the employment contract, policy or collective agreement. General industry practice is an important factor in determining whether overtime rates should be paid, both from the perspective of ascertaining what good industrial relations practice requires and from a practical perspective of attracting employees or being competitive in the labour market. The formula contained in the MWO, while not binding for non-minimum wage workers, can be used as a guide. It is available at this link: Minimum Wages

Working From Home: There are no laws expressly governing working from home in Trinidad and Tobago. In the (understandable) haste to implement alternative working arrangements, it can be easy to overlook some of the more practical issues that may arise. If an employer has an existing policy governing working from home, it is important to double check its provisions and make amendments or adjustments if needed. If an employer does not have an existing policy in place, it may be useful to consider issues such as reporting and timekeeping requirements for employees who are working from home, whether any additional data security measures should be implemented, especially for employees who will be working on their own devices, whether the employee's internet and/or telephone costs will be borne by the employer or the employee and whether the employer's workmen's compensation or employers' liability insurance will extend to any injuries that occur while the employee is working from home.

Relief Provisions: The relief provisions implemented by the Trinidad and Tobago government in response to the Covid-19 coronavirus outbreak to date are very limited. The Ministry of Finance has issued a press release detailing certain Financial and Economic Support Measures that are being put in place. It is available at this link: Financial and Economic Support Measures.

Under the national insurance scheme, employees who are incapable of working because of sickness or because they are suspected of having a contagious disease and are so certified by a registered medical practitioner, are entitled to the payment of a sickness benefit. However, at this time the government has not taken the decision to expand the benefits available under the national insurance scheme to provide for pandemic leave/benefits, temporary lay-off benefits or general unemployment benefits. It is possible that this might change if the situation becomes protracted.

It is important to note that employment in Trinidad and Tobago involves many nuances that are beyond the scope of this FAQ. We have attempted to set out, albeit in broad strokes, the general principles that would apply. Please contact us before relying on the contents of this FAQ, or if you require any specific assistance.

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