WTS Nobisfields

PRESENTATION ON MANAGING EMPLOYMENT RELATIONSHIPS AND COVID-19 FOR THE UK-GHANA CHAMBER OF COMMERCE

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IMPACT OF COVID-19 ON CONTRACTS OF EMPLOYMENT

In view of the global pandemic and the rapid spread of COVID-19 in Ghana, on 27 March 2020, the President of the Republic of Ghana, Nana Addo Dankwa Akufo-Addo imposed restrictions on the free movement of persons under the Imposition of Restrictions Act, 2020 (Act 1012) effective 30 March 2020 at 1am for two weeks subject to review.

- So, what does this mean for employers and their employees?
- Whatever next steps to be taken depends largely on what is stated in the contracts of employment. The parties would first have to look at the law applicable to them as stated in the contract.

THE LABOUR ACT, 2003 (ACT 651)

- The Labour Act, 2003 (Act 651) governs employment and labour relations in Ghana.
- **The discussion below is in reference to the exempted and non-exempted individuals and institutions as described by the Imposition of Restrictions Act, 2020 (Act 1012).**

Exempted individuals and institutions

- In accordance with the Labour Act, employers have a duty to ensure that every employee employed by them works under satisfactory, safe and healthy conditions.
- Thus, in relation to the outbreak of COVID-19, employers have a duty to create a hygienic environment for their employees to reduce or stop the spread of the disease.

- Under the Labour Act, employees are permitted to remove themselves from any situation that they reasonably believe presents an imminent and serious danger to their lives, safety or health after bringing such situation to the attention of their employers.

- Moreover, the Act prohibits employers dismissing or terminating the employment or withholding remuneration of employees who have removed themselves from the workplace on the basis of reasonable belief of imminent danger to their lives, safety and health.

- **For instance, if there is a COVID-19-infected employee or customer present at the workplace, the employees are allowed to remove themselves from the workplace as this compromises their health and safety.**

NON-EXEMPT INDIVIDUALS AND INSTITUTIONS

Due to the imposition of restrictions on the free movement of persons,

non-exempt employers may make these alternative arrangements if they are not

already outlined in the contract as opposed to termination:

- Employers can create conditions for their employees to work remotely from

home, if the nature of the job permits. Remote work should be paid for as usual.

- Employers could hold meetings with their employees via electronic

communication such as audio or video conferencing.

- Employers may exchange documents with their employees via electronic means
- Employers can provide the option of paid leave to the employees where

working from home is not an option.

- Employers may declare some of their employees redundant as a last resort if they are facing

economic challenges as a result of the pandemic. This however, may not be a viable option for many employers in view of the compensation obligation to affected employees

FORCE MAJEURE CLAUSES IN EMPLOYMENT CONTRACTS

❑ The presence of force majeure clauses in employment contracts could alleviate possible non-performance issues as a result of government measures taken in response to the rapid spread of the COVID-19 disease.

❑ The concept of 'force majeure' is widely recognised and operated broadly in common law jurisdictions. The term 'force majeure' can be used to describe an unforeseeable event or circumstance that prevents a party from fulfilling its side of a contract. Upon the occurrence of a force majeure event, one or both parties may be entitled to either,

1. Terminate the contract;
2. Be excused from wholly or partly performing the contract; or
3. Suspend the performance of a contract depending on the period of the unforeseen event.

However, what exactly the parties would be entitled to is dependent on the provisions of the employment contract.

Some examples of events that are usually described in contracts as force majeure events are as follows:

- ***acts of God,***
- ***pandemics,***
- ***epidemics,***
- ***wars,***
- ***riots,***
- ***terrorist attacks,***
- ***explosions,***
- ***abnormal weather conditions,***
- ***fires,***
- ***floods,***
- ***Government action,***
- ***changes to the law,***
- ***power failures,***
- ***strikes, lockouts,***
- ***delay by suppliers,***
- ***accidents and shortage of materials,***
- ***labour or***
- ***manufacturing facilities.***

Contracts of employment with such clauses usually state the subsequent options available to the parties of the contract and the necessary steps to take. Such clauses prevent a party from being liable for failure to perform the obligations under the contract.

In practice, such clauses may assume a variety of forms and are not always titled specifically as ‘force majeure’. Sometimes, they may be included in the termination clause or other clauses of the contract. Notwithstanding, what they are and how they operate depend very much on how they are drafted. It is important to look at the actual effect of the clause and not what the clause is called.

The party seeking to invoke the force majeure clause to excuse performance must prove that the event in question can be captured within the scope of the force majeure clause.

The inclusion of a force majeure clause may protect employers and employees from liability. It releases the employer from responsibility of payment during the period of possible suspension. Where the force majeure event goes on for a prolonged period of time, it gives the employer and the employee the right of termination of the employment contract.

DOES COVID-19 QUALIFY AS A FORCE MAJEURE EVENT?

- It is important to analyse the force majeure clause in the contract to determine whether COVID-19 can be construed into any of the events described in the clause.
- The World Health Organisation has recently classified COVID-19 as a pandemic and as such, COVID-19 would be captured within the scope of force majeure clauses that include '*pandemic'* or '*epidemic*' as illustrations of force majeure events
- Alternatively, as the government has enacted legislation to address the pandemic and made subsequent orders to slow and/or stop the spread of the disease (such as shut-downs and imposed restrictions on the free movement of persons), COVID-19 could also be captured within the scope of force majeure clauses that include '*government legislation*" or '*changes in law*' as illustrations of force majeure events.

- Interpretation of COVID-19 within the context of a force majeure clause

is largely dependent on the text of the said clause and by extension,

the contract as a whole.

- Additionally, establishing whether or not COVID-19 is a force majeure event may

also be determined by the particular circumstances of the contract and what was envisaged, what type of work was involved, whether performance of the contract

has been genuinely prevented by the disease among other factors.

- If COVID-19 cannot be interpreted within the context of the force majeure clause,

Then the party intending to rely on the fact that COVID-19 has interrupted the

performance of its contractual obligations must look at other options.

IMPACT OF FORCE MAJEURE EVENT ON A CONTRACT OF EMPLOYMENT

- Where COVID-19 qualifies as a force majeure event, the next step is to look at what the force majeure clause is intended to do and what in fact, it does. This will determine its impact on the performance of the parties' obligations under the contract.

- The impact of the force majeure clause is largely dependent on what is stipulated in the contract and the type of business the contract applies to. Some contracts may allow the obligations to be suspended till the force majeure event is over, while other contracts may allow either party, or both parties, to terminate the contract

- On the other hand, an employer may make different working arrangements for its employees if the contract allows it and/or the type of business the employer is engaged in allows it. Different conditions may be stipulated. It is important for the parties to review their contracts to ascertain what options are available to them.

- It would be reasonable to invoke the force majeure clause where there

is no other alternative way for the employee to continue performing his

obligations under the contract.

NB: It is important to note that where the force

majeure clause is invoked, the procedures outlined therein should be

followed, failure of which may result in breach of contract

- A party who intends to invoke the force majeure clause would normally be

obliged to inform the other party as soon as possible of the difficulty of

performing the contract and/or the possibility of suspending it for an

extended period of time.

- Furthermore, where a party seeks to rely on the force majeure clause to

terminate the contract of employment, that party must establish that the

event has prevented or hindered the performance of the contract.

On terminating a contract of employment by invoking the force majeure clause,

all remuneration due to the employee(s) till the date of the

occurrence of the force majeure event must be paid to the employee(s).

Employment contracts without Force Majeure clauses

In employment contracts where there is no force majeure clause, the doctrine of frustration may be relied upon.

The Doctrine of Frustration

Where a contract of employment does not make provision for a force majeure event, a party may consider relying on the doctrine of frustration as a ground for the non-performance of obligations under the contract.

Frustration of a contract occurs where, without the fault of either party, an unexpected event occurs which prevents one or both parties from meeting their basic obligations under the employment contract.

The event must not have been provided for by the contract of employment. If the contract of employment is frustrated, it terminates automatically by operation of law. Neither party will be in breach and neither party will have a claim against the other, other than for wages due to the date of the frustration.

The parties are relieved from further obligation to provide any notice or compensation for the termination of employment.

DIFFICULTY IN ESTABLISHING FRUSTRATION

- It has been established by judicial precedent that where the event could reasonably be foreseen by the parties, then frustration would not be found. If the parties can actually foresee the occurrence of an event but do not make provisions for it in their contract, they cannot state later that the contract has been frustrated by the said event.

- It could be argued that given the rapid spread of COVID-19 in other countries and their responses to it, it could be reasonably foreseen that once the first few cases of COVID-19 were reported in Ghana, it would only be a matter of time that it would spread and lead to imposed restrictions and/or self-isolation of persons.

- Nevertheless, relying on the fact that an employment contract has been frustrated by the effects of COVID-19 as grounds for termination of employment is a matter of proof.

- An alternative to relying on the doctrine of frustration to terminate a contract of employment, is the **Labour Act, 2003 (Act 651).** This can also be invoked in the absence of a force majeure clause in an employment contract.

TERMINATION OF A CONTRACT OF EMPLOYMENT

As a result of COVID-19, a contract of employment may be terminated by

Mutual agreement between the employer and employee in accordance with the

Labour Act.

- The parties may agree at any time to bring the contract of employment to an end.

Neither party will be in breach of contract and no claim for unfair termination of employment will arise.

Where the contract of employment is terminated by mutual agreement, the employee is entitled to remuneration earned

, any deferred pay due before the said termination, any compensation due to the employee in respect of sickness

or accident and in the case of foreign contracts/employees repatriation expenses for the employee and accompanying member(s) of the employee's family

- (i.e. persons not resident in Ghana but for the employment)

- Conversely, where there is no mutual agreement between the employer and employee to terminate the employment contract, the Labour Act allows employers to terminate the employment of its employees where a legal restriction is imposed on the employees, and this restriction prohibits them from performing the work they were employed to do.

- In this case, as the objective of the government directives is to reduce and/or halt the spread of COVID-19, an employer would be permitted to terminate the employment contract of its employees.

- This action would be deemed as fair termination and the employer would not liable for breach of contract and no claim for unfair termination can be made.

- A contract of employment may be terminated at any time subject to providing notice or payment in lieu of notice. Before terminating a contract of employment, the employer must follow the right procedures and best practices.

- This is to prevent any claims for unfair termination of employment being made against the employer.

REDUNDANCY

An employer who decides to declare redundancy in order to downsize operations

May do so an option of last resort, albeit under limited conditions specified in the Labour Act, 651 (section 65).

- However, in the COVID-19 era, where an employer is faced with significantly challenged cashflow and unable to meet operating costs, let alone break even as a result of restrictions imposed on the employer by the Government, as currently pertains, redundancy is not a viable option for an affected employer to contemplate.
- Primarily a redundancy situation, triggers compensation for affected employees. In most cases, the quantum of the compensation can be an onerous burden for the employer. In a COVID-19 era when there are severe financial constraints on the employer, it is unlikely that there will be funds to meet the legal obligation to compensate affected employees.
- In any event, **section 65 of the Labour Act** stipulates that a redundancy situation is triggered **when the employer contemplates (**emphasis ours**)** an arrangement, reorganisation etc. that affects jobs….. Therefore, it is arguable that when a restriction is forced on an employer who has no option but is legally bound to comply, a redundancy situation may not be triggered.

FREQUENTLY ASKED QUESTIONS

What can a party to a contract of employment do if there is a force majeure clause in the contract?

- Force majeure clauses allow parties to a contract of employment to terminate the contract due to an unforeseeable event that prevents the performance of obligations under the contract.
- The party seeking to rely on the force majeure clause must first determine whether or not COVID-19 can be classified as a force majeure event. This depends on whether COVID-19 can be construed into any of the events described in the clause.
- The party must then inform the other party that the COVID-19 has prevented or hindered the performance of the contract. The procedures outlined in the clause should be followed, failure of which may result in breach of contract.

What other options are available to employers and employees where there is no force majeure clause in a contract of employment?

Where an employer is facing economic challenges and/or cannot provide all of its employees with agreed full-time work, the employer may consider redundancy for some of its employees to keep the business afloat during the COVID-19 crisis.

If some employees are made redundant, these employees will beentitled to compensation. An employer who makes an employee redundant but does not pay the employee compensation will be liable for unfair termination of employment. **(S.63)**

Where the contract of employment is silent on force majeure events, an employer or employee may rely on the doctrine of frustration where the unforeseen circumstance such as COVID-19 has not been provided for by the contract of employment. However, the party stating that the contract has been frustrated bears the burden of proving that the COVID-19 crisis could not have been foreseen.

- If the party successfully proves that COVID-19 has indeed frustrated the contract, both employer and employee are relieved from any obligation to provide any notice or compensation for the termination of employment.

- As an alternative to relying on the doctrine of frustration to terminate a contract of employment or where the party cannot prove that the COVID-19 crisis has frustrated the contract, that party can rely on the Labour Act.

- Under the Act, an employment contract may be terminated by mutual agreement between the employer and employee. **(S.15)**

- The Labour Act also allows employers to terminate the employment of its employees where a legal restriction is imposed on the employees, and this restriction prohibits them from performing the work they were employed to do **(s.62(d))**

- Thus, the directives of the government would qualify as legal restrictions thereby giving the employer the right to terminate the contract of employment

Can an employee challenge a redundancy or termination decision?

- ❑ Yes.
- ❑ An employee aggrieved with the decision to be made redundant or to be terminated due to the COVID-19 crisis or the procedure adopted by the employer may challenge the termination or redundancy at a Court of competent jurisdiction.

- ❑ The National Labour Commission is vested with the power to, among things, deal with employees' complaints concerning the infringement of their rights under the Labour Act.

Can an employee working in an exempt institution refuse to work if the environment is not safe or hygienic?

- ❑ Yes.

- ❑ Under the Labour Act, employers have a duty to ensure that every employee employed by them works under satisfactory, safe and healthy conditions. **(S.118)**

- ❑ In addition, employees are permitted to remove themselves from any situation that they reasonably believe presents an imminent and serious danger to their lives, safety or health after reporting it to their employers. **(S.119(1))**

❑ The Act prohibits employers dismissing or terminating the employment or withholding remuneration of employees who have removed themselves from the workplace. **(S.119(2))**

What options are available to the non-exempt individuals and institutions who have been restricted from moving freely?

➢ Employers can create conditions for their employees to work remotely from home, if the nature of the job permits.

➢ Employers could hold meetings with their employees via electronic communication.

➢ Employers may exchange documents with their employees via electronic means

➢ Employers can provide the option of paid leave to the employees where working from home is not an option.

Other options such as unpaid leave, graduated reduction in salaries for some or all Employees for a specific period, must be considered prior to termination

➢ Employers may make some of their employees redundant if they are facing economic challenges as a result of the COVID-19 pandemic.

❑ **Can an employee take unpaid leave?**

❑ Unpaid leave means leave that an employee takes without pay and with the permission of the employer.

❑ There are no express provisions in the Labour Act and the Labour Regulations, 2007 (L.I. 1833) that address unpaid leave. The law expressly addresses sick leave, annual leave and maternity leave.

❑ Since there is no legal right to an unpaid leave and unpaid leave goes to the essential term of the employment contract, which is remuneration, this would require a discussion between the employer and the employee.

❑ **Can an employee force the employer to keep him employed during the COVID-19 crisis?**

❑ No.
❑ If the employer is facing economic challenges, the employee may either be made redundant or terminated.

In a situation where an employer imposes self-isolation on an employee or where the employee voluntarily self-isolates, can the period of self-isolation qualify as sick leave?

❑ Under the Labour Act, sick leave is a period of absence from work allowed owing to sickness, which is certified by a medical practitioner. **(S.24)**

❑ To be entitled to sick leave depends on the reason for the imposed or voluntary self-isolation. If the reason is due to the employee displaying symptoms of COVID-19 as well as certification from a medical practitioner, then the employee would be entitled to sick leave.

❑ Thus, if an employee is diagnosed with COVID-19 by a medical doctor, that employee would be entitled to sick leave.

❑ On the other hand, if the reason for the imposed or voluntary self-isolation is as a precautionary measure to reduce or prevent the spread of the COVID-19 disease, then the employee would not be entitled to a sick leave.

❑ As the employee is not ill, the employee may still be able to work in self-isolation.

❑ **If an employee is diagnosed with COVID-19, would he be entitled to sick leave?**

❑ Yes.

❑ The employee would be entitled to sick leave if he provides the employer with certification from a medical doctor.

❑ **Can employer force an employee who displays symptoms akin to the COVID-19 symptoms to stay at home to prevent the infection from spreading?**

❑ Yes.

❑ The Labour Act states that employers have a duty to ensure that every employee employed by them works under satisfactory, safe and healthy conditions. **(S.118)**

❑ If it is confirmed by a medical practitioner that an employee has COVID-19, the said employee can be made to stay at home to self-isolate and recuperate as the employer owes a duty to its other employees to keep them safe and healthy.

Can employees who are parents seek leave to look after their children during the impartial lockdown?

- No.
- There is no specific leave entitlement to look after children. However, an employee can seek permission from the employer to take his annual leave in advance or ask for unpaid leave if annual paid leave has already been used up. This requires a discussion between the employer and the employee.

Conclusion

- It is important to analyse a contract of employment to determine the existence of a force majeure clause.

- COVID-19 may be classified as a force majeure event depending on how the force majeure clause is defined and interpreted.

- The party seeking to invoke the force majeure clause bears the burden of proof that COVID-19 is a force majeure event.

- The impact of COVID-19 on contracts of employment depends on what has been stipulated in the contract.

Conclusion

Termination of contracts or redundancy must be last resort options. Before then less disruptive options as may be considered as follows:

- unpaid leave for an agreed period
- Suspension of allowances and benefits for some or all employees
- graduated percentage reduction of salaries for some or all categories of employees
- Where termination is inevitable, affected employees must be given the right of first refusal, should the employee decide to recruit into those positions in future

❑ Where the contract of employment is silent on force majeure events, the doctrine of frustration may be relied upon however, the party stating that the contract has been frustrated bears the burden of proving that the event (in this case, COVID-19) could not be foreseen.

❑ Employers who are still in operation should ensure their employees work Under satisfactory, safe and healthy conditions.

❑ Employers that have been restricted from operating normally may make alternative working arrangements if the nature of the business permits.

❑ Termination of employment should be a last resort and employers must Follow the right procedures and best practices when they decide to terminate

END

QUESTIONS

THANK YOU

NB: STAY SAFE AND ADHERE TO THE HEALTH PROTOCOLS.

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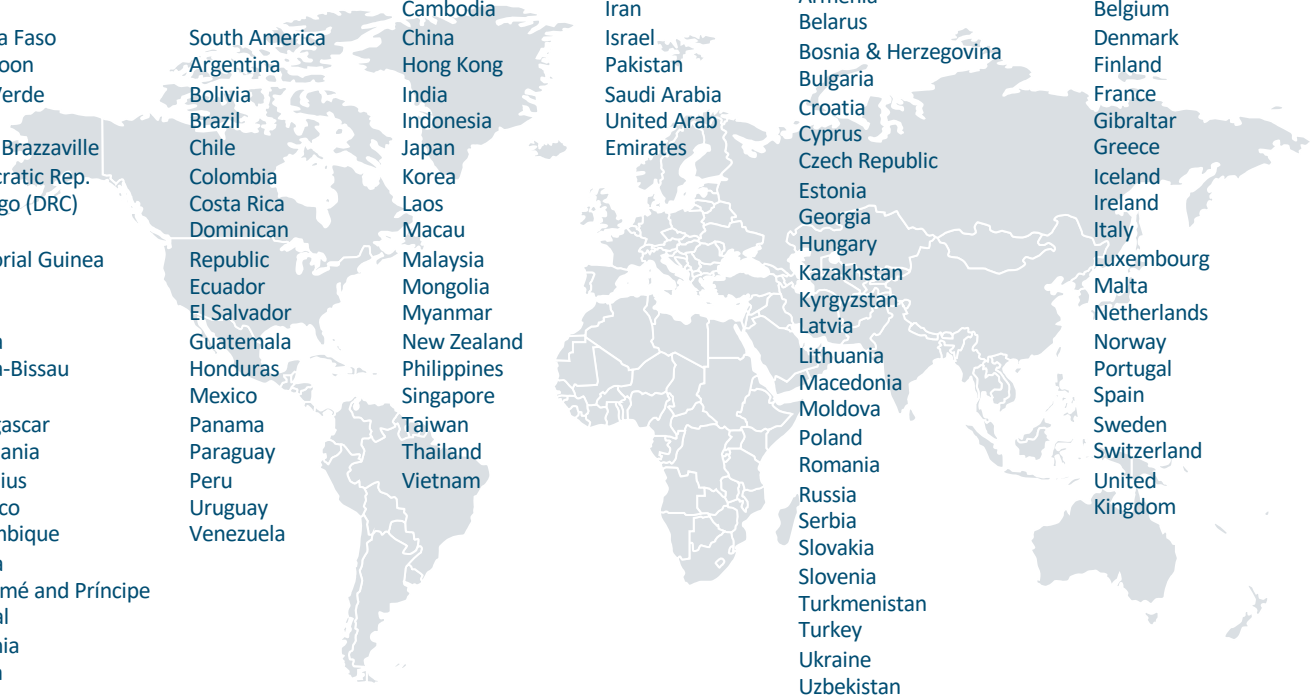

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