



THE OBLIGATIONS ON BUSINESSES OPERATING DURING COVID-19 ALERT LEVEL 4

Regulation 16(6)(b) of the Regulations in terms of the Disaster Management Act issued on 29 April 2020 places four obligations on each business, industry and entity in both the public and private sector which are permitted to operate during Alert Level 4:

1. **Covid-19 compliance officer**

They must designate a Covid-19 compliance officer. This person should oversee the implementation of the Workplace Plan (see below), as well as adherence to the standards of hygiene and health protocols relating to Covid-19 at the workplace.

2. **Phased in return from other provinces/metropolitan areas/districts**

They must phase in the return of their employees to work in order to manage the return of employees from other provinces, metropolitan areas and districts. In terms of regulation 16(4), workers who perform an essential or permitted service who have to commute to and from work on a daily basis between provinces, metropolitan areas or districts, must have a permit (Form 2 of Annexure A) to travel and perform such work.

3. **Measures**

They must develop measures to ensure that the workplace meets the standards of health protocols, adequate space for employees (i.e. one person per 1.5 metres of floor space), and social distancing measures for the public and service providers, as required.

4. **Workplace Plan**

They must develop a Workplace Plan for the phased in return of their employees to the workplace, prior to reopening the workplace for business. This Plan must correspond with Annexure E, and must contain the following information:

- which employees are permitted to work;
- what the plans are for the phased-in return of their employees to the workplace;
- the health protocols that are in place to protect employees from Covid-19; and
- the details of the Covid-19 compliance officer.

The **measures** that must be taken, and the **Workplace Plan**, deserve further mention.

The measures

The employer must develop measures to ensure that the workplace meets the standards of health protocols. It is important that the employer adheres to the principles required in the Occupational Health and Safety Direction of 28 April 2020 in this regard.

The measures must ensure that there is **adequate space** for employees (i.e. one person per 1.5 metres of floor space), and must require **social distancing** measures for the public and service providers. This must be read with **regulation 5(5)**, which sets out the substantive requirements for the measures that must be taken to promote physical distancing of employees. These measures must include the following:

- **Measures to enable employees to work from home, or to minimise the need for employees to be physically present at the workplace**

This applies to all employees, whether or not they are on the list in the Workplace Plan of those who “can” work from home. The measures should, within reason, enable all employees to work from home where reasonably possible, and “minimise the need” for employees to be physically present. This acknowledges that certain tasks or duties can or should be performed at the workplace, but the employer is required to try to reduce these where reasonably possible or keep them to a minimum. Cost and other operational considerations will come into play, and there will have to be a reasonable balancing of these. The purpose of the list in the Workplace Plan of all staff who “can” work from home is presumably required to indicate who should reasonably be permitted and encouraged to work from home. But the fact that someone can work from home does not of course mean that this is the optimal operational solution for an employer, and the regulation does not prescribe that anyone who can work from home may not be required or permitted to attend the office. Where such attendance at the office is needed, the employer must take steps to try and minimise this need (e.g. by way of rostering, requiring attendance only in emergencies, etc).

- **Restrictions on face-to-face meetings**

Face to face meetings are not prohibited, but employers are expected to limit these, presumably to circumstances where this is operationally necessary or appropriate. In such circumstances,

restrictions on the number of people in a meeting and rules regarding the required space between people in any face to face meeting would need to be in place.

- **Special measures for employees with known or disclosed health issues or comorbidities, or any condition which may place such employees at a higher risk of complications or death if they are infected with Covid-19**

The regulation does not prescribe what those special measures must be. These are, nevertheless, measures other than the “normal”/“ordinary” measures that must be taken. Measures such as ensuring adequate space (see also reg 5(4)), providing employees with cloth masks, providing hand sanitizers, soap and clean water, limiting face-to-face meeting, and requiring employees who can work from home to do so, are ordinary measures. “Special measures” would be additional measures to protect this group of vulnerable employees. These could include additional personal protective equipment (such as visors), workplace redesign where possible, temporary allocation of alternative functions, such as switching a telephone receptionist with a front of house receptionist, and so on.

- **Special measures for employees above the age of 60 who are at higher risk of complications or death if they are infected with Covid-19.**

It is not entirely clear why this category of employees is dealt with separately and not as part of the group with comorbidities. But be that as is may, special measures must be taken in respect of these employees. If these employees are able to work from home, they should. If they cannot, when they are at work, the employer must take special care to protect them, e.g. by being allocated their own separate workspace, limit face-to-face meetings, additional personal protective equipment, etc.

The Workplace Plan

Annexure E provides that the Workplace Plan for small businesses can be basic, reflecting the size of the business. (The term “small business” is not defined.)

Medium and large businesses must have a more detailed plan and must include the following:

- the date the business will open and the hours of operating;
- the timetable setting out the phased return to work of employees, to enable appropriate measures to be taken to avoid and reduce the spread of the virus in the workplace;

- the steps taken to get the workplace Covid-19 ready;
- a list of staff who can work from home; who are 60 or older; and staff with comorbidities who will be required to stay at home or work from home;
- arrangements for staff in the establishment (including sanitary and social distancing measures, screening facilities and systems, attendance record system and infrastructure, the designated area where the public is served, canteen and bathroom facilities, testing facilities for establishments with more than 500 employees, staff rotational arrangements, etc.);
- arrangements for customers or members of the public, including sanitation and social distancing measures.

The list of employees

From the above it is clear that every employer must compile a list of employees comprising the following categories:

- those who can work from home;
- those with health conditions or comorbidities.
- those who are older than 60;

An employee may fall into more than one category. For example, an employee may be older than 60, have an underlying health condition and be able to work from home. Or, the employee may fall into only one category, e.g. the employee may be older than 60, not be able to work from home and have no underlying health condition.

In order to prepare this list, the employer would need to request the information from the employees. This is a **voluntary disclosure**, and an employee cannot be sanctioned for not making the disclosure. Where the employer is aware of a particular employee's underlying health condition, it may, however, use this information in compiling the list.

Workplace plans must be available for inspection. For purposes of ensuring the privacy of the employees, it would be advisable, when preparing the lists of employees, to use **employee numbers** as opposed to names and surnames, and for employers to treat this information as confidential and thus restrict access thereto.

The **health conditions** that may need to be taken into account include, for example:

- chronic lung disease or moderate to severe asthma;
- diabetes;
- serious heart conditions;
- severe obesity;
- chronic kidney disease undergoing dialysis;
- liver disease; and
- immune-compromised individuals (in this regard many conditions can cause a person to be immuno-compromised, including cancer treatment, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and other immune weakening medications).

Must employees with comorbidities, who cannot work from home, be refused access to the workplace?

Paragraph 4 of Annexure E provides for inclusion in the list of “staff with comorbidities who will be required to stay at home or work from home”. There is, however, nothing in the substantive obligations, contained in regulation 5(5) and 16(6)(b), that imposes an obligation for employees in this category not to come to the workplace. Of course, if they can work from home, they should do so. If they cannot work remotely, special measures must be taken in order to protect this category of employee when at work to protect their health and safety. (See above).

As regards the phrase in paragraph 4 of Annexure E “who must be required to stay at home” is concerned, there are a number of possible interpretations.

- For example, it could mean that the list must contain only the names of those in each category who will in fact be required by the employer to stay at home or work from home. On this interpretation the list will not contain the names of other staff who fall into the same category but who will indeed be required by the employer to work at the office.

- Or it introduces a prescriptive condition or “special measure” for employees with health conditions, namely that they must stay at home, and work from home if they can. If this is so, it renders paragraph 5(5)(d) of the regulation (requiring “special measures”) superfluous.

In our view, the provisions of regulation 5(5) should take precedence, and those employees who have underlying conditions could accordingly be required to attend at work, but they would then have to be subject to additional, special, measures to ensure their health and safety. The circumstances of each business will have to be considered carefully. Given the possibility of different interpretations, we urge businesses to obtain independent advice to guide them in this regard.

Labour Workstream

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