



Handling employment contracts adversely affected by the outbreak of the COVID-19 pandemic

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A consequence of the outbreak of COVID-19 is that a number of employees engaged in services that are considered non-essential are no longer at their conventional places of work having been directed by the government to work from home so as to manage the spread of the pandemic.

Given the duration of the restrictions imposed by the government, many employers have found it difficult to generate revenue that is required to meet their business overheads including salaries. Employers have handled this challenging environment in varied ways. Some have resorted to sending their employees on unpaid leave, others have imposed salary cuts on their employees while others have summarily terminated contracts of employment. Given the arbitrary nature of some of these interventions by employers and the fact that the pandemic situation could be used by some employers to unduly infringe on the rights of employees, the government has proposed an amendment to the Employment Act that is meant to protect the rights of both the employer and the employee.

The proposed amendment to the Employment Act seeks to bar employers from terminating a contract of

service or dismissing an employee or even coercing and employee into taking a pay cut for the reason that the employer's ability to pay salaries has been adversely affected by the pandemic. However, in appreciation of the fact that certain employers may be genuinely unable to meet salary obligations on account of the pandemic, the amendment proposes that an employer may in such circumstances permit its employees to take leave of absence without pay for the duration of the pandemic.

Upon the coming into force of the amendment to the Employment Act, the law will bar employers from seeking to take the position that employment contracts they entered into have been frustrated hence discharging them from further performance of obligations under the said contracts. As a result, employees who were issued with letters terminating their contracts of employment citing the adverse effects of the pandemic will have redress against their employers and will have the right to seek their reinstatement after the pandemic is declared to have ended. It is assumed that given that it is the World Health Organization that declared COVID-19 a pandemic, such redress must await a statement from the same organization downscaling the status of COVID-19 from that of a pandemic.

An important matter raised by the amendment is that an employer must not coerce his employee into taking a pay cut. It will therefore be prudent for employers to consult with their employees before preparing and having their employees sign an agreement detailing any understanding they have reached with employees regarding a pay cut. This is so as not to be seen to have coerced their employees into taking a pay cut. Going by past interpretations by the courts in Kenya regarding coercion, the existence of a written agreement between the employer and the employee should be ample evidence to show that the employee was not coerced into taking a pay cut having executed a contract varying the terms relating to remuneration in his earlier contract of employment.