

NEWS ALERT

COVID-19: MAURITIUS IMPLEMENTS EMERGENCY RELIEF MEASURES TO FACE THE IMPACT OF COVID-19 ON THE ECONOMY

Mauritius is currently under lockdown and a period of national confinement has been imposed on a population of 1.3 million people, starting from 20 March 2020 up to of 4 May 2020. To help various industries and sectors cope with the financial impact of Covid-19, the Government has introduced various emergency measures, namely in employment law, contract law, data protection law, insurance law and so on.

The article below addresses some of the questions arising from the present situation pending the presentation of the Covid-19 Bill as announced by the Prime Minister on 24 April 2020 and the enactment of the law.

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Definitions

“Confinement Period” or *“Lockdown”* means the general lockdown announced by the Government of Mauritius (the “Government”) on 19 March 2020, prohibiting the freedom of movement of people in the Republic of Mauritius, initially starting from 20 March 2020 to 3 April 2020 and subsequently extended twice up to 4th May 2020;

“Curfew Order” means the prohibition on freedom of movement, enforced by the Government under the Prevention and Mitigation of Infectious Disease (Coronavirus) Regulations 2020, directing that no person or class of persons shall remain outdoors in Mauritius from 20 March 2020 to 4 May 2020, subject to certain prescribed exceptions ;

“COVID-19” or *“coronavirus”* means Wuhan Novel Coronavirus (2019-NCov);

“GWAs” comprises of (i) the Government Wage Assistance Scheme for employers dated (the “Scheme”) 23 March 2020, (ii) the Self-Employed Assistance Scheme dated 31 March 2020 and the (SE Scheme”) and (iii) the extended Wage Assistance and Self-Employed Assistance Scheme dated 18 April 2020;

“Self-quarantine” or “Self-isolation” means voluntary refraining from any contact with other individuals for a period of time (such as two weeks) during the outbreak of a contagious disease usually by remaining in one's home and limiting contact with family members; and

“Worker” means an employee whose basic wage does not exceed MUR 600,000 per annum and does not exceed MUR 50 000 per month.

A. WAGE ASSISTANCE SCHEMES

1. What is the Wage Assistance Scheme for employers and who is entitled to benefit under that Scheme?

On 23 March 2020, the Mauritian Government announced the implementation of a Wage Assistance Scheme (the “Scheme”) for all employees in the private sector earning a minimum wage of Rs. 50,000 per month (the “Workers”). Under the Scheme, businesses became entitled receive payment for an amount equivalent to 15 days’ basic wage for each of their employees, subject to a cap of Rs. 12,500 per employee, as follows:

- For Workers earning from Rs. 9,700 to Rs. 25,000: a pro-rata wage assistance from Rs. 4,850 to Rs. 12,500;
- For Workers earning between Rs. 25,000 to Rs. 50,000: wage assistance fixed at Rs. 12,500; and
- For Workers earning more than MUR 50,000: Nil.

On 18 April 2020, following the extension of the Confinement Period to 4 May 2020, the Minister of Finance announced that the Scheme was being extended to cover the period of 1 April 2020 to 30 of April 2020 (the “Extended Scheme”). Under the Extended Scheme, businesses in the private sector will be eligible to receive an additional funding equivalent to one month’s basic wage bill for each of their employees in the same ratio as above.

The MRA has brought some clarifications on its website with respect to the terms of the Scheme:

- The Scheme is applicable in respect of Mauritians in full-time or part-time employment and expatriate employees working in Mauritius;
- Employers in the category of Private Household and NGOS are not entitled to the Scheme;
- The quantum of the wage assistance claimed should be based on the basic salary of the employee as normally declared by the employer in his monthly NPS Contribution Returns;
- In processing the application, the MRA will carry out internal checks to verify the correctness of the claim;

- After internal verification, the MRA will credit the approved amount to the employer's bank account used by him for payment of monthly NPS contribution. Any adjustment to that amount will be made once normal work resumes after curfew;
- Self-employed, such as for example hairdressers, will be entitled to the Scheme only with respect to employees for whom they have been paying monthly NPS contributions;
- Businesses having trainees or staff on placement will be entitled to the the Scheme only if contributions are being made in favour of the trainees or places;
- Exceptionally, businesses who have been unable to effect payment of their workers' salaries for the month of March 2020 due to cash flow problems, may still apply to the MRA for assistance under the Scheme so that the salaries may be paid for the months of March and April 2020; and
- Employers who have not paid their employees for the months of March and April 2020 or who have laid off even one employee during the confinement period will be debarred from benefitting from the Scheme.

2. **What is the Self-Employed Assistance Scheme and who is entitled to benefit under that scheme?**

The Minister of Finance announced a Self-Employed Assistance Scheme (the "SE Scheme") on 31 March 2020. When it was first announced, the SE Scheme offered financial support of Rs. 5,100 to eligible self-employed individuals, for the period starting 16 March 2020 to 15 April 2020. Following the extension of the Confinement Period, the Government has extended the SE Scheme to cover the period of 16 April 2020 to 30 April 2020, for an additional amount of Rs. 2,550, which will be paid to eligible self-employed individuals.

Self-employed individuals will be eligible to benefit under the SE Scheme if they are individuals in business (*examples: shops, hawkers, hairdressers, etc.*) or if they are casual workers (*examples: masons, plumbers, artists etc.*) whose total monthly household income does not exceed MUR 50,000 per month.

B. EMPLOYMENT LAW

For the purposes of this guide, the term "Employee" or "Employees" shall refer to all employees working in Mauritius under the provisions of the Workers' Rights Act, irrespective of the amount of the basic salary being earned by them and the term "Worker" (or "Workers") shall refer to any person whose basic salary is MUR 50,000 or less in any given month.

1. **Can an employer deduct half of the annual leave allowable under the Workers' Rights Act 2019 ("WRA") from the Confinement Period? Can the Confinement Period be offset against annual leaves?**

The WRA provides that:

- a full-time Worker who has completed 12 consecutive months with the same employer is entitled to 22 working days' total annual leave,
- a part-time Worker, who has completed 12 consecutive months with the same employer, is entitled to annual leave on a pro rata basis under a prescribed formula in the WRA, and
- a full-time Worker who has completed a minimum of 6 consecutive months of work with the same employer, and who has been present on all the working days during that period of time, shall be entitled to one day's annual leave during each subsequent month up to the 12th month.

The WRA further provides that where an employer and an employee are unable to agree as to when the above-mentioned annual leaves are to be taken, half of the leave period shall be fixed by the employer and the other half by the worker.

In the absence of any express provision in the laws in connection with the measures taken by the Government with respect to the Covid-19 pandemic, it would appear that there is nothing precluding employers from deducting half of Worker's annual leave period from the Confinement Period if such employees have not been working from home during that period.

In the case of employees earning more than MUR 50,000 per month, the contract of employment will prevail.

2. **Sick Leave and Covid-19- Can the confinement period [i.e. the general lockdown imposed by Government] be deducted from an employee's sick leave?**

The WRA currently provides that:

- A full-time Worker is entitled to 15 working days' sick leave on full pay provided that the worker has been in continuous employment with the same employer for a period of 12 consecutive months,
- a part-time Worker, who has completed 12 consecutive months with the same employer, is entitled to sick leave on a pro rata basis, and
- A full-time Worker who is in continuous employment with the same employer for a period of 6 consecutive months and who has been present on all the working days during that period shall be entitled to one day's sick leave for each month of service up to a maximum of 6 days' sick leave, during each subsequent month up to the twelfth month.

Employers would not be entitled to unilaterally decide to offset the Confinement Period against their employees' (both Workers and other employees) sick leaves to the extent that the said employees have not reported sick during that period.

3. **Can a period of isolation, self-isolation or self-confinement be deducted from an employee's annual leave or sick leave? What if the period exceeds the employee's sick leave entitlement?**

After the Confinement Period, employees who reasonably suspect that they have contracted Covid-19 should place themselves under Self-Confinement or Self-Isolation as they have a responsibility to undergo the testing procedure as quickly as possible in order to avoid further spread of the virus. Should they obtain confirmation that they are infected, then the employees should undergo a period of isolation as prescribed by a licensed medical practitioner and/or the relevant authorities.

As a matter of principle, employees should be entitled to paid sick leave where they obtain confirmation that they have become infected with Covid-19. In case the sick leave period taken by the employee exceeds the total number of sick leaves to which they are entitled, then the excess days of sick leave will not be paid.

Whether a period of Isolation or Self-Confinement would be on an unpaid sick leave basis would depend upon the circumstances of each particular case, such as:

- whether the Worker has cumulated 12 consecutive months in the employment of the employer,
- whether the Worker has exhausted sick leave or annual leave entitlements, and
- whether the Worker has not actually worked from his place of Isolation or Confinement during the period of Isolation or Self-Confinement.

4. **Can an employer temporarily reduce the hours of work of its employees?**

An employer may require a worker to work temporarily for a time shorter than that specified in his contract of employment at a reduced remuneration, subject to the approval of a supervising officer of the Ministry of Labor, Industrial Relations and Employment in Mauritius.

5. **Can an employer ask its employees to take a pay cut because of the impact of COVID-19 on their business?**

As a general rule, a reduction in salary requires the employee's consent. Otherwise, this may amount to a breach of contract and the employees can deem themselves to be constructively dismissed. If the employees are prepared to agree for a reduction in their salaries, the employer and employee can re-negotiate the contract of employment on new terms but employees cannot be coerced into such a decision.

6. **Redundancy: Can an employer make its employees redundant in light of the impact of COVID-19 on their business?**

Employers may either close down their companies or reduce the number of employees in their employment, either temporarily or permanently, by following the procedures laid out in the WRA pertaining to redundancy.

However, employers who have received payment under the GWAS will have to reimburse the Government for the wage assistance received if they make even one of their employees redundant during the Confinement Period.

7. **Introduction of shift work to comply with social distancing requirements: Can employers introduce shift work or staggered shifts in the workplace to comply with social distancing requirements?**

The spread of the global pandemic has increased the need for emergency safety measures such as social distancing, staggered work shifts, downsizing of operations, delivering services remotely, work from home arrangements and other similar exposure-reducing measures.

Under the present legislation, no provisions have been made for the introduction of staggered work shifts in order to contain the spread of the virus. However, depending on the contract of employment, employers may, with the consent of their employees, elaborate and implement such workplace health and safety policies as they deem fit in an attempt to mitigate and prevent the spread of the virus as much as possible.

8. **Can an employer request an employee to work from home after the end of the Confinement Period? Can employers force their workers to either (i) work from home or (ii) can employers force their workers to attend work in the workplace?**

Employers can request their employees to work from home after the end of the Confinement Period. Allowing or requiring people to work from home (or another remote location) is a recommended step for helping to control the transmission of COVID-19.

It is true that the absence of an express clause in the contract of employment, the employer may be in breach of contract. However, if the rationale for such action is to protect the health and safety of the wider workforce under the Occupational Safety and Health Act 2005, then the employer's statutory duty in respect of protecting the health and safety of its employees may be deemed to be satisfied.

In such cases, the employer should provide the employee all reasonable facilities to enable the latter to properly discharge his or her duties from home.

➤ **Can employers force their workers to attend work in the workplace?**

Work from home arrangements are not practicable or feasible for certain professions or positions within the organisation. In these circumstances, the employees will have to attend their workplace. Employers can consider whether steps should be taken to limit contact between employees, for example, by having segregation within and outside premises, adjusting teams and introducing staggered shift rotations, adjusting working hours, and/or limiting the number of people in the office premises or on site at any given point in time.

9. **Can workers refuse to either (i) work from home or (ii) refuse to attend work because of the risks of contracting COVID-19?**

To the extent that reasonable facilities have been provided to employees to work from home, employees who unreasonably refuse to work, for example, where there is negligible risk, could face disciplinary action from their employers. The same reasoning would apply to employees refusing to attend work where all reasonable safety measures have been taken in the circumstances.

10. **Can the terms of the contracts of employment be re-negotiated during this period of pandemic?**

The consent of the employee will have to be sought first before any terms are renegotiated in the contract of employment, with a view to safeguard the continuity of employment if the business of the employer has been adversely affected.

C. WORKPLACE HEALTH AND SAFETY (“OSHA”) LAWS

1. **What duty of care and what responsibilities do employers have vis a vis their workers under the Occupational Safety and Health Act 2005 (“OSHA”)?**

According to Section 5 of the Mauritian Occupational Health and Safety Act 2005 (the “OSHA”) every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare of all his employees at work. This gives rise to a duty of care i.e. a legal obligation for employers to take various measures to ensure that the workplace is safe for all employees, including the obligation to:

- provide and maintain a working environment;
- provide and maintain any plant or system of work;
- maintain any place of work under his control, including the means of access to, or egress from it, safe and without risks to health;

- ensure that use, handling, storage or transport of articles or substances is safe and without risks to health;
- provide and maintain adequate facilities and arrangements for the welfare at work of the employees; and
- provide information, instruction, training and supervision as is necessary to ensure the safety and health at work of his employees; and
- ensure that any person not in his employment is not exposed to any risk to his safety or health.

A breach of the provisions of the OSHA by an employer may give rise to a fine of not exceeding MUR 75 000 and to a term of imprisonment not exceeding one year.

2. What duties and responsibilities do employees have vis a vis their employers under OSHA?

Notwithstanding the general duty of care placed upon employers to ensure the health, safety and welfare of their workers, there is also a corresponding duty under section 14 of the OSHA for every employee to cooperate with his employer in the fulfilment of its obligations under OSHA. The employee must comply with the prescribed safety measures established in the workplace, taking reasonable care not only for his own safety but also the safety of others (including avoiding exposing others to health and safety risks), and use safety devices and protective equipment correctly.

The internal procedures in the workplace must direct workers who have symptoms (i.e. fever, cough, or shortness of breath) to report to their immediate supervisor. Employees should notify their immediate supervisor of any situation which they reasonably suspect presents an imminent and serious danger to their own or other people's life or health (for instance other employees, customers or visitors attending the office premises). In principle, the employer cannot require workers to return to work in a situation where there is continuing imminent and serious danger to life or health, until the employer has taken remedial action to address and mitigate such risks, where necessary.

3. Should employers elaborate and implement a COVID-19 workplace policy?

Yes, employers should have a written policy which governs employees who are required to work both in the office premises and remotely from home and the COVID-19 policy should address such things as working hours, productivity, remote meeting protocols, as well as

- The Duty to provide a safe and secure work environment
- Sanitizing of work premises
- Protection of cleaners
- Masks and sanitisers for employees
- Protective shields for employees in front office, and

- An update of the internal manual on procedures

D. CONTRACT LAW ISSUES

1. Following the impact of Covid-19, can borrowers or obligors invoke the defence of Force Majeure to suspend their payment obligations under the contract?

Under the laws of Mauritius, a party who fails to fulfill an obligation pursuant to a contract may invoke an event of *force majeure* by virtue of articles 1147 and 1148 of the Mauritius Civil Code (the "Civil Code"). An event of *force majeure* may alternatively be agreed upon contractually, allowing the parties to pre-determine or restrict the scope and application of such an event.

In the context of the Covid-19 global outbreak, it is necessary to consider the *force majeure* clauses in facility/security agreements in order to determine whether a borrower or obligor may suspend its payment obligations thereunder.

Where the facility or security agreement does not expressly provide for a *force majeure* clause, the borrower/obligor may invoke the defense of *force majeure* under the Civil Code, and in so doing, will need to demonstrate that the event precluding it from fulfilling an obligation was unforeseeable (*imprévisible*) and irresistible (*irrésistible*).

Being an unprecedented event for Mauritius, and indeed the world, the Mauritius Courts may draw guidance from the French judgments. According to French Courts decisions, the existence of pandemics does not *per se* justify the existence of a *force majeure*; this has been seen in times where epidemic such as the Chikungunya¹ or the Dengue² were prominent diseases.

Nonetheless the current circumstances are unique and distinctive from previous pandemics, which have necessitated Government intervention (*fait du prince*), i.e, the imposition of a curfew order on Mauritius inhabitants. Moreover, a recent decision of the French Court of Appeal in Colmar³ provides that the Covid-19 was an event of *force majeure* in the specific context of an asylum seeker not appearing before the court "*due to the exceptional and insurmountable circumstances, of the nature of force majeure, linked to the current outbreak of COVID-19*" and because the asylum seeker had been in contact with a person infected with the virus.

2. Material Adverse Change clauses under Mauritius law governed facility agreements

¹ Cour d'appel de de Basse-Terre - ch. civile 01,17 décembre 2018 / n° 17/00739

² Cour d'appel de de Nancy - ch. civile 01 22 novembre 2010 / n° 09/00003

³ CA Colmar, 12 mars 2020, n°20/01098.

A Material Adverse Change (“MAC”) clause is one which allows a party to rescind a contract where an event adversely affects it economically. Under the Civil Code, the parties are free to determine events which would qualify as a MAC. In the context of pandemics such as Covid-19, coupled with lockdowns or curfews, it is recommended that such events be captured in a MAC clause within facility and security agreements so as to manage parties’ expectations in such unforeseen situations.

3. **The current lockdown/confinement situation under the laws of Mauritius**

A Curfew Order is currently in force in Mauritius and any breach of same shall constitute an offence punishable by a fine of Rs 500 or imprisonment for a term not exceeding 6 months. The curfew is subject to further provisions of the Regulations. We understand Government is currently drafting a Covid-19 Bill which will be effective on de-confinement (expected on 4 May 2020) and which will set out sanitary parameters and public discipline post confinement, amongst others, and will furthermore provide for measures that need to be implemented in case a similar situation arises in the future.

4. **Suspension of loan repayments: definite or indefinite period?**

Where an event triggering the suspension of loan repayment is not provided for in a loan agreement, the borrower may engage with the lender to mutually agree on the suspension of loan repayments for a period of time, which typically would be for a definite period. If negotiations fails, the borrower may invoke *force majeure* if the set of facts so warrant.

On a related note, the Bank of Mauritius (i.e, the Central Bank) has introduced a Support Programme which includes a special relief amount of MUR 5.0 Billion through commercial banks made available from to all sectors of activities impacted by Covid-19, capping interest on these advances to impacted economic operators at the fixed rate of 2.5% per annum and a moratorium of six months on capital and interest repayments, with a two-year tenure.

5. **Impact on security documents**

Before and during the Confinement Period, loan and security documents may be submitted online to the Registrar-General/ Conservators of Mortgages for registration/inscription. The Registrar General's Department has set up a team to work from home so as to process online any loan or other related document.

6. **Enforcement of security documents**

As the courts of Mauritius are not operational (save for urgent applications) during the Confinement Period, it would unfortunately not be possible to enforce security documents which require mandatory judicial intervention for enforcement. On the other hand, where no such judicial intervention is needed, those security documents may be enforced by the parties in accordance with the provision thereof.

7. **Bankruptcy, insolvency and Court proceedings**

As mentioned in the preceding paragraph, all courts of Mauritius are not operational (save for urgent applications) during the confinement/lockdown period.

8. **Board and shareholders meetings**

With the Confinement Period prevailing in Mauritius, it would not be possible for directors or shareholders of companies to meet physically. Moreover, as commercial passenger flights have been frozen during this period, non-resident directors wishing to participate at board meetings in Mauritius are unfortunately not able to do so in the circumstances.

Board meetings

Notwithstanding the Confinement Period, company boards may meet (and in fact should meet to discuss business and contingency planning in the midst of Covid-19), by means of audio, or audio and visual, communication by which all directors participating and constituting a quorum can simultaneously hear each other throughout the meeting, in accordance with the Companies Act 2001.

As an alternative to electronic/virtual board meetings, the directors may assent to written board resolutions by emails, facsimiles, or similar means of communications (e.g., Whatsapp, Messenger, etc). These statutory alternatives to physical meetings leave company boards without any excuse for not discussing the affairs of the company when required, particularly in unforeseen (and perhaps sometimes, dire) circumstances such as a lockdown/confinement.

Shareholders meetings

Similarly, shareholders' meetings may be held by means of audio, or audio and visual, communication by which all shareholders participating and constituting a quorum, can simultaneously hear each other throughout the meeting. As an alternative to electronic/virtual shareholders' meetings, the shareholders may assent to written resolutions by emails, facsimiles, or similar means of communications (e.g., Whatsapp, Messenger, etc).

9. Stock Exchange of Mauritius

Trading and settlement activities on The Stock Exchange of Mauritius and Central Depository & Settlement were suspended for part of the confinement and resumed on Monday 6 April 2020, subject to the following conditions:

- Participants have adequate funds in their bank accounts by 10:30 hrs. on each settlement day;
- The relevant settlement banks submit debit instructions to the Bank of Mauritius by 11:00 hrs. on each settlement day; and
- the Bank of Mauritius transfers the funds among the settlement banks by 12:00 hrs. on each settlement day.

E. DATA PROTECTION LAWS

1. Disclosure by employees of their health status linked to Covid-19

Section 14 of the OSHA places an obligation on employees to cooperate with their employers in the discharge of any duty or requirement placed upon their employers. Section 5 of OSHA states that an employer shall ensure the safety, health and welfare at work of all his employees, in particular, ensuring that any person in his employment is not exposed to any risk to his safety or health.

Covid-19 has been declared a pandemic and the Government has put in place appropriate measures to protect the population against contracting the pandemic. As such, an employee may be required to disclose to his employer his health status if he has been diagnosed with Covid-19 in order to prevent the spread of such disease in his workplace.

2. Notification to authorities

In an attempt to contain the spread of Covid-19, employers may find themselves in situations where special categories of personal data from the data subjects may be collected.

Under the Data Protection Act 2017 (the "DPA"), special categories of data in relation to data subjects include amongst others, his physical or mental health or condition which reveals his health status and such other personal data as the data protection commissioner may determine to be sensitive personal data.

Section 29 of the DPA allows for the processing of personal data where the data subject consents, unless the processing is necessary for the purpose of preventive medicine and for the management of health or social care system and services.

In light of the above, an employer may disclose the health status of an employee who contracted Covid-19 to the relevant authorities provided that the employee is made aware of such disclosure.

3. Disclosure to other employees

An employer has an obligation to protect data obtained from his employees and in line with section 27 of the DPA, shall ensure that such information is destroyed once its purpose for collecting has lapsed.

Furthermore, section 31 of the DPA lays down the appropriate measures which an employer shall consider in order to maintain confidentiality of data obtained from employees. Consequently, an employer may inform other employees that an employee has been diagnosed with Covid-19 without revealing the identity of that employee.

F. INSURANCE LAWS

1. Insurance coverage of employers

Some insurance policies provide for business interruption coverage under certain circumstances. Business interruption arising as a result of a pandemic may not be covered under certain insurance policies.

Article 1983-16 of the Mauritian Code Civil (the "Code Civil") provides that an insurance policy will normally set out the nature of risks being covered.

Article 1983-19 of the Code Civil provides that loss and damage which are caused by unforeseeable events fall under the responsibility of the insurer, except where the insurance policy contains exclusion clause to the contrary.

Therefore, employers need to review its insurance coverage to assess whether adequate protection are in place to safeguard against the risk of losses arising from Covid-19.

2. Medical insurance for employees suffering from covid 19

Generally, the extent of cover will depend on the type of medical insurance the employee has taken and a medical insurance will specify the type of illness which falls under its coverage.

Article 1983-6 of the Code Civil provides that life insurance guarantees payment of the agreed sum, either at the death of the insured, or where an event affects his existence.