THE POTENTIAL IMPACT OF THE CORONAVIRUS PANDEMIC ON EMPLOYMENTLAW AND IMMIGRATION PERMITS IN NIGERIA

Introduction

The world economy is now at a global halt due to the coronavirus pandemic. Hence, many countries have had to implement 'stay at home' as well as 'social distancing' policies to curtail the spread of the novel Coronavirus ("COVID-19"). On February 27, 2020, the Federal Republic of Nigeria recorded its first case of the COVID 19, through an infected European business traveler who arrived Lagos, Nigeria for a series of business meetings. Over the course of the following weeks, the number of cases increased drastically and has shown no signs of slowing down. Discriminating against no one; the upper, middle and lower class, black, white, Hispanic, etc., with its effects on human lives and day to day activities nothing less than devastating. As at the date of this article, more than 5 billion people worldwide had been asked to work from home due to the pandemic with the World Health Organization reporting more than 1, 870,076,000 cases and over 116,052 deaths had been recorded due to the complications from the COVID-19.

No doubt, there are many implications of the pandemic ranging from economic, financial as well as contractual issues which will arise from this scenario. However, the aim of this article is to, inter alia, consider the impacts of the COVID-19 on Nigerian labour law issues, as well as on Nigerian immigration permits.

A. COVID-19 AND HEALTH SAFETY CONSIDERATIONS IN THE WORKPLACE

The Labour Act (the "Labour Act")1, places a qualified obligation upon an employer to provide a safe system of work (i.e. to carry out his operations in a manner that complies with safety regulations).

Similarly, the Factories Act2 also places an obligation upon employers/ owners or occupiers of a factory to ensure the health, safety and welfare of employees within the factory. Thus, it is the duty of the employer to ensure that the provisions of the relevant employment statues relating to cleanliness, overcrowding, ventilation, lighting, drainage and sanitary conveniences are complied with. In view of this, it is necessary for employers to consider crucial measures to prevent the spread of COVID-19 in workplaces.

The Supreme Court in the case of IYERE v. BENDEL FEED AND FLOUR MILLS LIMITED3 held that "Where there exists a service relationship between employer and employee, the former is under a duty to take reasonable care for the safety of the latter so as not to expose him to unnecessary risk". The Supreme Court further stated that the employer is under a duty to take reasonable care for the safety of the employee in all the circumstances of the case so as not to expose him to an unnecessary risk.

In view of this, both public and private sector employers are imposed with the duty to ensure that workers and employers are not exposed to the COVID-19, taking into contemplation, the rate at which the virus is easily transmitted amongst individuals and groups. Therefore, Nigerian employers should have this in mind as they put in place, measures to curtail the spread of the virus. No doubt, this would have been a major consideration for the 'Stay at Home' policies imposed by many governments around the world.

1 CAP L198, Laws of the Federation of Nigeria ("LFN") 2004.

2 CAP F1, LFN 2004.

3 (2008) LPELR-SC.309/2002

B. RESULTING ECONOMIC CONSTRAINTS OF COVID-19

The pandemic has also caused a brutal hit to the global economy which, in turn, has had a corresponding negative effect on businesses worldwide. For example, on the one hand, it is no news that China's economy is much more deeply intertwined with the world's economy. With a 19.24% share of global GDP[4], several countries depend on China for their manufacturing and technological needs. On the other hand, China is also one of the world's largest importers of crude oil. With several cities around the world under lockdown, disrupted economic activities negatively affect key macroeconomic indicators like oil prices and interest rates. From a slump in oil prices as a result of reduced demand from China (as well as the recently concluded oil price war between Saudi Arabia and Russia) and other oil importing countries and lowered demand for jet fuel due to widespread travel restrictions, to a reduction in the supply of critical manufacturing parts from China due to the closure of factories, a general upset in production and supply chains across automotive, travel & tourism, healthcare, high-tech manufacturing, and retail industries, there is no doubt that we are likely to see businesses lose trillions of United States Dollars in revenue as a result of the pandemic.

C. IMPACT ON NIGERIAN BUSINESSES AND ITS EMPLOYEES

Nigerian businesses are not exempted from the harsh economic realities caused by COVID-19. With an economy heavily reliant on; (a) benchmark price of oil in the international market for the implementation of its economic objectives and; (b) imports, especially from China; Nigerian businesses have been seriously affected. The Lagos State Government on March 25, 2020 had initially placed restrictions by ordering the closure of non-essential markets, stores, supermarkets, cinemas, entertainment centers and also placing a ban on gatherings. On March 29 2020, the Federal Government imposed further restrictions by announcing the implementation of measures aimed at curbing the spread of the virus in Lagos and Ogun State as well as the Federal Capital Territory Abuja. The measures include imposing a restriction or curfew on movement for an indefinite period as long as the scientific and health advisers to the Federal Government recommend otherwise. With the loss of revenue arising from this and barely enough work for their staff to carry out, businesses are constantly thinking of ways to handle their staff without running afoul of the law especially as it relates to honouring their obligation to provide remuneration to employees for work done.

D. EMPLOYEE BENEFITS AND COVID-19

Some have argued that, an employer's obligation to provide remuneration to its employees is directly tied to the latter's performance of his obligations under the employment contract; hence, 'no work, no pay'. The pertinent question then arises, "Is the 'no work, no pay' principle applicable in a situation where the employee's inability to work is as a result of the inability of the employer to provide work for the employee"? A recourse to the provisions of the Labour Act would provide us with some clarity. Section 17 of the Labour Act which speaks to the duty of the employer to provide work provides as follows:

> *"Except where a collective agreement provides otherwise, every employer shall, unless a worker has broken his contract, provide work suitable to the worker's capacity on every day (except rest days and public holidays) on which the worker presents himself and is fit for work; and, if the employer fails to provide work as aforesaid, he shall pay to the worker in respect of each day on which he has so failed wages at the same rate as would be payable if the worker had performed a day's work:*
>
> *Provided that –*
>
> *a. where, owing to a temporary emergency or other circumstances beyond the employer's control (the period of which shall not exceed one week or such longer period as an authorized labour officer may allow in any particular case), the employer is unable to provide work, the worker shall be entitled to those wages only on the first day of the period in question; and*
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> *b. this subsection shall not apply where the worker is suspended from work as a punishment for a breach of discipline or any other offence".*

Also, the Protection of Wages Convention, 1949 (the "Wages Protection Convention")[5] prohibits an employer from making deductions out of an employee's salary except to the extent prescribed by national laws or regulations or fixed by collective bargaining agreement or arbitration award. As at the date of this article, there exists no national laws or regulations which permit an employer to make deductions from an employee's salary. In essence, the ability of an employer to make deductions from an employee would rest solely on the existence of a clause to that effect in a collective bargaining agreement or an arbitration award.

It is important to note that not all categories of workers are contemplated by the Labour Act. The Labour Act governs the employment of 'lower cadre' workers. Lower cadre workers as defined in Section 91 of the Labour Act means: "Any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour, but does not include-

a. any person employed otherwise than for the purposes of the employer's business, or

b. persons exercising administrative, executive, technical or professional functions as public officers or otherwise, or

c. members of the employer's family, or

d. representatives, agents and commercial travellers in so far as their work is carried on outside the permanent workplace of the employer's establishment; or

e. any person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the articles or the material; or

f. any person employed in a vessel or aircraft to which the laws regulating merchant shipping or civil aviation apply.

From this point, we shall refer to employees contemplated by the Labour Act as Workers and those whose employments are governed by their employment contracts as Employees (both Employees and Workers will be regarded as "Staff"). Employees not covered by the Labour Act are governed by their relevant contracts of employment, HR policies, collective agreements or other agreements with relevant unions.

4 https://www.statista.com/statistics/270439/chinas-share-of-global-gross-domestic-product-gdp/

5 Article 8.

For employees under this category, there are no provisions under Nigerian law which stipulate that work must be provided by the employer as all aspects of the employment relationship are fully governed by the provisions of the employment contract. Hence, whether or not work is made available by the employer, the Employee shall be entitled to be compensated as agreed in the employment contract whether or not work has been done unless stated otherwise in the employment contract.

For businesses, especially those who have been forced to shut down, it would be economically unsustainable to continue incurring excess cost at this point in time where the global economy is on a bearish run. Thus, businesses would have to take cost-cutting measures to ensure that they at least stay afloat. These cost-cutting measures would in one way or the other, affect Workers and Employees adversely. From Staff downsizing to pay cuts, businesses are constantly thinking of ways to survive the harsh economic realities we find ourselves in. Some of the common steps taken by most employers, in times as these, may include:

(a) Compelling Workers/Employees to take their annual leave with full pay;

(b) Compelling Workers/Employees to take a compulsory leave without pay;

(c) Reducing a percentage of salaries;

(d) Reducing the number of hours worked (for Workers/Employees paid on an hourly basis) thereby effectively reducing their salary;

(e) Initiating redundancy procedures.

E. EMPLOYEE BENEFITS AND COVID-19

(i) Compelling Workers/Employees to take their annual leave with full pay

Section 18 of the Labour Act mandates employers to grant Workers leave annually. Due to the COVID-19 pandemic, it is not unusual for businesses to seek to accelerate and compel its Workers to undergo their annual leave, rather than have their leave deferred. This may also be applicable to Employees as well per the terms of their contract of employment.

It is important to note that the Labour Act does not provide for the compulsion of Workers by employers to take their annual leave. On the other hand, Employees cannot be compelled to take their annual leave as it is an entitlement to which they alone have the discretion to exercise. Hence, unless a mutual agreement has been reached between employer and Workers/Employees to take their annual leave with pay, compelling them to do so would amount to a breach of the employment contract.

(ii) Compelling Workers/Employees to take a compulsory leave without pay

Pursuant to Section 5 of the Labour Act, employers are prohibited from making any deduction or making any agreement or contract with a Worker for any deduction from the wages to be paid by the employer to the Worker. Also, as earlier stated, Section 18 of the Labour Act mandates employers to grant their Workers fully paid leave.

Employees are entitled to a certain number of leave days to be taken annually during which such employees would ordinarily be entitled to receiving their salaries.

Hence, it could be justifiably argued that compelling an employee to go on a compulsory leave without pay would amount to making deductions from the salary of such employee.

Therefore, any attempt by an employer to compel its Workers to take unpaid leave, will amount to a breach of Sections 5 and 18 of the Labour Act. The courts will therefore not enforce any contract that compels workers or Employees to take unpaid leave not only because it is inconsistent with the provisions of the law but also because it is contrary to international best practices.
Hence, where an employer goes ahead to implement this proposed step, it runs the risk of having an action brought against it at the NIC by an aggrieved Worker/Employee.

(iii) Reducing a percentage of the Workers/Employees' Salaries

As earlier stated, Section 5 of the Labour Act and Article 8 of the Wages Protection Convention prohibits the deduction of an Worker's wages whether unilaterally or by an agreement. Article 8 of the Wages Protection Convention provides that:

> *"(1) Deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or arbitration award.*
>
> *(2) Workers shall be informed, in the manner deemed most appropriate by the competent authority, of the conditions under which and the extent to which such deductions may be made."*

Thus, based on the provisions above, an employer cannot make deductions to the wages of a Worker/Employee, unless the laws or regulations of Nigeria prescribe that deductions can made. Although Nigeria is a party to and has ratified the Wages Protection Convention, it is important to note that the National Assembly is yet to codify, that is adopt the provisions thereof into an Act and as such, the Wages Protection Convention would ordinarily not be enforceable in Nigeria.

Nonetheless, it is important to mention that the NIC has adopted a different position on the enforceability of international labour conventions in Nigeria and has sought to apply such conventions, regardless of whether or not they have not been codified by the National Assembly[6]. In this regard, the NIC has relied on an amendment to Section 254(C) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "Nigerian Constitution") which provides that:

> "notwithstanding anything to the contrary in this Constitution, the National Industrial Court (NIC) shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith."

Therefore, to the extent that (i) the Nigerian Constitution grants the NIC the jurisdiction and power to deal with any matter pertaining to any international convention which Nigeria has ratified, and (ii) there currently exists no Nigerian law or regulation which permits an employer to make deductions from the wages of its Staff, it is arguable that any action initiated by any Staff at the NIC, due to such employer's reduction of Staff salary, may be decided in favour of the aggrieved Staff, as such deduction may be seen by the NIC a contravention of the Wages Protection Convention.

6 Aero Contractor Co. of Nigeria Ltd. V. National Association of Aircrafts Pilots and Engineers (NAAPE & Ors.

7 (1997) 11 NWLR (Pt.530)

Although, in practice, employers can negotiate with their Staff especially considering that in extreme cases, such Staff can have their contracts of employment terminated and many Staff will rather have reduced salaries than completely lose their incomes. Furthermore, with regard to Workers there may be some leeway under the proviso to Section 17 which states that

> *"Provided that –*
>
> *where, owing to a temporary emergency or other circumstances beyond the employer's control (the period of which shall not exceed one week or such longer period as an authorized labour officer may allow in any particular case), the employer is unable to provide work, the worker shall be entitled to those wages only on the first day of the period in question"*

The foregoing suggests that, for Workers, their working hours can be reduced and consequently, the wages related to same.

(iv) Reducing the number of hours worked (for Workers paid on an hourly basis) thereby effectively reducing their salary

Although not the norm, some employment relationships in Nigeria involve the payment of remuneration per hour. Section 13 (1) of the Labour Act provides that normal hours of work shall be those fixed either by mutual agreement, by collective bargaining or by the industrial wages board, where there is no machinery for collective bargaining. It is typical for employers to fix the working hours prior to engaging the Workers. However, nothing precludes employers from renegotiating and agreeing in writing the working hours of the Workers during the pendency of the COVID 19 pandemic which would in effect, save some costs for the employer. It is important to note however that this would only apply to Workers whose salaries are paid per hour. For such Workers, the employer will simply reduce the number of the hours allocated to such Workers thereby reducing the quantum of salaries to that portion of their workforce.

In view of this, it is therefore advisable for employers to renegotiate the working hours of its Workers and set out same in writing before implementing this proposed step. Do also refer to the analysis above, regarding the proviso to Section 17 of the Labour Act.

(v) Initiating Redundancy Procedure

Redundancy is defined by Section 20(3) of the Labour Act as an "involuntary and permanent loss of employment caused by an excess of manpower".

As a general rule, the need for a termination by redundancy arises from no fault of the Worker but rather contemplates a situation which is beyond the control of the employer. In PEUGEOT AUTOMOBILE NIGERIA LIMITED v. OJE[7], the court defined redundancy as:

> *"a mode of removing of an employee from service when his post is declared "redundant" by his employer. It is not a voluntary or forced retirement. It is not a dismissal from service. It is not a voluntary or forced resignation. It is not a termination of appointment as is known in public service. It is a form unique only to its procedure where an employee is quietly and lawfully relieved of his post. Such type of removal from office does not, in my view, carry along with it any other benefit except those benefits enumerated by the terms of contract to be payable to an employee declared redundant."*

Determination of Redundant Workers or Employees

In determining the Workers to be made redundant, Section 20 (1) (b) of the Labour Act prescribes a principle known as the "last in, first out" principle; subject to other factors such as skill, ability and reliability. There are no restrictions on the use of other methods for selecting Workers to be made redundant as the provisions of the Labour Act in this regard are prescriptive and the Labour Act does not preclude the use of management discretion in determining redundant Workers. Regarding Employees, the Labour Act is also indicative and employers may use whatsoever reasonable method they choose.

Effecting the Redundancy

There is no mandatory laid down procedure under Nigerian law for effecting a redundancy; save that in applicable cases, the employer is required to inform the trade union or workers' representative of the reasons for and the extent of the anticipated redundancy where the Workers/Employees are unionized.

It is not uncommon for employment contracts and employee handbooks to include specific provisions on redundancy. Where they do, it is expected that the provisions are followed to the latter. However, the absence of specific redundancy provisions in the Human Resource document or contract of employment does not preclude the employer from declaring a position redundant which it can rightfully do as an employer at any time. The employer will be required to terminate the employment contracts of affected Employees in accordance with their respective terms (i.e. with regard to the giving or notice or payment in lieu of notice as applicable).

Payments on Redundancy

Under Nigerian Law, employers are only obliged to make compulsory redundancy payments to redundant Workers/Employees where this is provided for in the contract of employment or other applicable company policies. Where these do not exist, the employer has the discretion to offer such severance payments to affected Workers/Employees and inform them of its offer of payments during the redundancy. Unionized sectors/workers may also be entitled to such terminal benefits on redundancy as stipulated in the relevant Collective

Bargaining Agreements ("CBA").

These Collective Bargaining Agreements, are agreed at industry sector level and are binding on members of the relevant unions and associations (employers/employees). Typically, CBAs will include provisions for the calculation of any severance payments due to member-employees in the event of a redundancy and where the Workers/Employees are unionized, it is important to examine the provisions of the applicable CBA. It is not unusual for terminal benefits on redundancy to be negotiated either directly with affected Workers/Employees (non-union) or at union level for the unionized Workers/Employees.

Notice Period for Redundancy

Where the employees in question do not fall under the category of employees (i.e. Workers) envisaged by the Labour Act (e.g. lower cadre employees and labourers), the applicable notice period would be the notice period for termination as stated in the contracts of employment of the relevant employees and as such, any notice or termination that fails to comply with the provisions of the contract of employment will be deemed invalid and the employee will be liable to compensation. It is also worthy of note that the obligations and rights of an employee still subsist during the pendency of the notice.

Where a contract of employment does not provide for a notice or where the redundancy involves the category of employees envisaged by the Labour Act, the applicable notice period to be given has been provided by Section 11(2) of the Labour Act below as follows:

S/N	DURATION OF EMPLOYMENT	PRESCRIBED NOTICE PERIOD
1.	Up to Three (3) months	One (1) day
2.	Up to Two (2) years	One (1) week
3.	Up to Five (5) years	Two (2) Weeks
4.	Five (5) years or more	One month

The provisions of Section 11(3) and (4) of the Labour Act mandate that notices for (2) – (4) above shall be in writing, and the dates of the periods of the statutory notices shall exclude the day the notice is given.

Payments in lieu of notice

Under Nigerian law and trade customs and traditions, an employer is allowed to offer Staff the option of payment in lieu of notice. Hence, nothing prevents Staff from waiving the right to notice by accepting payment of one (1) month Salary in lieu of notice. Pursuant to this, it can be implied that the provisions of the law acknowledge payment of salary in lieu of notice as a means of termination.

By virtue of the provisions of Section 11(9) of the Labour Act, where the offer for payment in lieu of notice is accepted, the employer is obliged to pay only the existing salary prior to the termination excluding overtime and other allowances.

It is pertinent to note that where an employer opts for payment in lieu of notices he must not default as the employment relationship will still be in existence and the employer will be liable to pay all benefits accrued to the Staff during that period.

F. NIGERIAN IMMIGRATION PERMITS AND COVID- 19

Apart from the considerations relating to labour law as elucidated on above, it is also important to outline the potential implications of the pandemic on immigration permits as they apply to expatriate workers in Nigeria. These immigration permits are usually tied to the period of engagement of such expatriate in the particular company. Thus, the immigration permits are time bound and for a definite period. For example, the Combined Expatriate Residence Permit and Alien Card ("CERPAC") is granted for a period of one (1) year subject to renewal.

The question can then be asked, "in the event that the lockdown extends for several months [8], will it be necessary to extend the tenure of the expatriate quota to cover the period of the lockdown in the affected states?".

On the one hand, it may be argued that immigration permits such as Temporary Work Permits (TWPs) and Work/Residence Permits also known as CERPAC which have already been issued to the expatriates are not in any way affected due to the fact that such expatriate employees are still required to work remotely from home as required by their employers and as such, the tenure of such permits ought not be affected.

On the other hand, it may also be argued that those expatriates who have been engaged due to their specific technical expertise and are thereby unable to undertake the terms of their employment due to the lockdown may need to be granted a corresponding extension of their CERPAC as opposed to having their employers undertake additional expenses for CERPAC renewals which would be avoided if they are granted an extension to cover for the period of the lock down.

Conclusion

In a situation like this, it is advisable for employers to engage with its Staff to discuss the impacts of COVID-19 on its business operations and their terms of employment; together with the likely impact of the pandemic on the revenue of the company, further to which they may decide to release new policies and procedures in line with proposed measures.

It is also important to note that the pandemic may also trigger redundancy, which should only be implemented after engaging with the Employees and Workers in line with their employment contracts and the company's policy as well as notify union representatives where their Staff belong to any union.

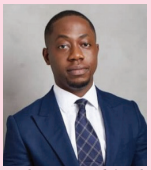
The issue will no doubt be a major talking point which many countries that issue work permits and work visas will need to consider as part of the implications of the coronavirus pandemic on labour law. The Nigeria Immigration Service (NIS) should also consider extending the CERPACs of expatriate employees to cover the period lost as a result of the lock down (In the event the lockdown goes on for several months). This would no doubt, provide relief to employers of expatriates and the expatriates themselves.

8 This could potentially be extended dependent on the spread of the COVID-19 in Nigeria.

For more information on this Article, please contact

Kunle Obebe
Partner
kunleobebe@bloomfield-law.com

Mobolaji Fasehun
Executive Associate
mobolaji.fasehun@bloomfield-law.com



Solomon Oshinubi
Associate
solomon.oshinubi@bloomfield-law.com

or your usual contact at Bloomfield LP.