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Directive on Compensation for Workplace-acquired COVID-19

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## Introduction

1. On 23 July 2020, the Minister of Employment and Labour issued the Directive on compensation for workplace-acquired COVID-19 in terms of the Disaster Management Act (referred to as the 'COIDA Directive').
2. This replaces the Notice issued on 23 March 2020 by the Compensation Commissioner.
3. There are impacting amendments listed herein.

## Application

1. The directive applies as of 23rd July 2020.
2. It remains applicable as long as COVID-19 is a declared national disaster. It will be replaced with a Compensation for Occupational Injuries and Diseases Act, Act 130 of 1993 ('COIDA') Circular Instruction thereafter.
3. Any employee, regardless of occupation, is entitled to claim in the event of contracting COVID-19 at the workplace.

## Claim methodology and document control

Please read the Directive with respect to the specific methodology for submitting reports.

The claim process for compensation of workplace-acquired COVID-19, in short:

1. Where an employee claims workplace-acquired COVID-19, the employer must investigate, document and report the claim.

2. The documentation to be submitted must include:
   a. The COVID-19 risk and planned/applied containment which the employee is exposed to in the workplace; this must align with the risk stratification defined in the COIDA Directive.
   b. The known source of COVID-19 exposure at the workplace (Index case or fomite).
   c. Where applicable, travel history of a work assignment in a high-risk area.
   d. The exposure must be such that the COVID-19 disease has arisen out of and in the course of employment[i].
   e. Confirmation of the COVID-19 diagnosis as per WHO guidelines.
   f. The chronology between workplace exposure and development of symptoms.
   g. PCR positive test; as long as the case is not confirmed, no claim can be made.

3. The medical officers of the Compensation Commissioner Office ('CC') will assess and confirm acceptance or rejection of a claim.

4. If the claim is accepted, the employee is entitled to:
    a. Sick pay (75% of wages as per the prescribed maximum, for a period of 30 days). For longer absence, the CC must review.
    b. Permanent disablement, which will be assessed 3 months from date of diagnosis.
    c. Medical aid for a period of 30 days from diagnosis. For longer, the CC must review.
    d. Death benefits if the employee dies from COVID-19 complications.

5. Reporting in the prescribed format can be done manually or online and requires:
    a. W.Cl.1
    b. W.Cl.14
    c. Exposure and Medical Questionnaire (annexure to COIDA Directive)
    d. W.Cl.22
    e. W.Cl.110
    f. A medical report which includes the above information in 2. (risk assessment, source, history, symptoms and confirmation of diagnosis, chronology, special tests e.g. chest X ray et.).

6. During the follow-up, a progress W.Cl. 26 must be issued with every consultation and a final W.Cl.26 when Maximum Medical Improvement has been reached.

**Critical changes between COIDA Directive and the Notice of 23 March 2020**

1. New definitions
    a. Workplace: is '*the place or places where the employees* work' and, thus includes home for those employees working from home.

    b. The Directive defines 'workplace-acquired COVID-19' as '*an instance where an employee contracts COVID-19 whilst carrying out his or her duties'*.

2. Removed conditions for workplace-acquired COVID-19 as occupational disease
    a. The COIDA Directive has changed the conditions for COVID-19 to be declared workplace-acquired: whereas the Notice required '*occupational* exposure' and a '*high-risk* work environment', the COIDA Directive only requires '*exposure*' and explicitly states that '*all employees, regardless of occupation, are entitled to make a claim for compensation in the event that they contract COVID-19 at the workplace'*.

    b. The diagnosis must still align with the HBA risk assessment which the DEL Consolidated Directive requires every employer to perform. This is important as, in its consideration and adjudication of a claim, the CC must consider the inherent risk posed by the categories.

3. Nexus of the COVID-19 disease with the workplace
    a. The scope of the COIDA Directive is to deal with work-related exposures when an employee is exposed to suspected or confirmed COVID-19 cases:
        i. In the workplace.
        ii. During official trips in high-risk areas.

iii. Whilst performing any duty in pursuance of the employer's business.

b. The COIDA Directive requires that the employee must be exposed to a '*known source of COVID-19 at the workplace*' and that there must be a '*chronological sequence between exposure and development of symptoms'*.

c. COIDA limits occupational disease to diseases which have arisen out of and in the course of employment
   i. Section 65 of COIDA (read with Section 1) defines 2 types of occupational disease:
      1. Under the presumption principle (S 65(1)(a)), the employee is presumed to have contracted a disease mentioned in Schedule 3 and that such disease has arisen out of and in the course of employment; this principle does not apply as COVID-19 is not in the Schedule.
      2. Under S 65(1)(a), it must be proven that the employee has contracted a disease other than a disease contemplated in S 65(1)(a) **and that such disease has arisen out of and in the course of employment**.
   ii. The COIDA Directive requires that a claim for workplace-acquired COVID-19 shall comply to Section 65.
   iii. This means that it is important to consider that, whilst not explicitly documented in the COIDA Directive, the statutory condition that COVID-19 must have arisen out of and in the course of employment applies.

4. Benefits defined in COIDA Directive
   a. Whereas the Notice limited occupational disease sick pay and cover for medical aid to 30 days, the Directive gives the Commissioner the right to review each case on merit.

   b. Whereas the Notice required suspected and unconfirmed cases in self-quarantine to be remunerated by the employer, the Directive defines that the Compensation Fund does not provide for compensation for unconfirmed cases or cases under investigation. Note that the Consolidated Directive requires the employer to pay sick pay for confirmed work-related close contact exposures in the workplace.



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[i] The following principles, tests or guidelines are distilled from the authorities to determine whether an employee was within the sphere or area of his/her employment when an occupational exposure (or an accident) occurred:

1. **Consider the extended meaning of occupational 'accident' in the legislative context**
    a. An 'accident' in the legislative context is not an accident in the ordinary acceptance of the word; it has an extended meaning beyond an 'unlooked for mishap' and 'an untoward event which is not expected or designed'.
    b. In considering whether an event is an accident, the interpretation has to be beneficial for an employee.
    c. If the event is a risk which can be reasonably held to be incidental to the employment and the disease flows from that risk, it must be held to be an injury arising out of the employment.

2. **Each case must be dealt with on its own facts: there is no bright-line test.**

3. **The Atkins test on the terms and conditions of the contract of service of the work at home**
   The Atkinson test identifies whether the risk, which lays at the base of the occupational disease, can be held to be incidental to the employment:
    a. An employee is acting in the course of employment, when doing something he/she was employed to do or when doing something in discharge of a duty to the employer, directly or indirectly, imposed upon the employee by the contract of service.
    b. The disease arises out of employment means that there is a cause- and- effect: the discharge of the duty by the employee is the cause and the disease by exposure is the effect

Ref to No 1: McQueen v Village Deep GM Co Ltd **1914 TPD 344** De Villiers JP at 347, in relation to the prevailing employee-compensation scheme, said the following at the commencement of the judgment:
'The most difficult question which arises in the present case is whether the facts as stated by the magistrate can be said to constitute an accident within the meaning of the law.' De Villiers JP took the view that it was perfectly plain that an 'accident' in the legislative context was not an accident in the ordinary acceptance of the word, which, in general terms, is 'an effect which was not intended'. He had regard to developments in English law in which an 'accident' for the purposes of the legislation there in force had been given an extended meaning beyond an 'unlooked for mishap' and 'an untoward event which is not expected or designed'. He recorded in his judgment that our then Workmen's Compensation Act derived directly from the English Act and, as discussed above, considered that it ought to be interpreted beneficially for an employee

Ref to No 2: In MEC for Health, Free State v DN **2015 (1) SA 182** (SCA), the case of a State employed paediatrician who was raped by an intruder while she was on duty at the Pelonomi Hospital, the Court proposed that the relevant question to be asked is: "*whether the wrong causing the injury bears a connection to the employee's employment. Put differently, the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment.*" But the SCA pointed out in the same paragraph that "*(t)here is of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with on its own facts.*"

Ref to No 3 The Atkinson test
The general principle is stated as follows in St. Helen's Colliery Co v Hewitson, **1924 A.C. 59** at p 70 by Lord Atkinson:

"… a workman is acting in the course of his employment …., when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service."
At pp. 75 and 76:
"I think the words 'arising out of' suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e. the discharge of the duties of the workman's service, the cause of that effect, and that the words 'in the course of his employment' mean while the workman is doing what he is employed to do, i.e. discharging the duties to his employer imposed upon him by his contract of service..".

The test was adopted and applied in Leemhuis and Sons v Havenga, **1938 T.P.D. 524** per Schreiner J (as he then was) at p. 526 where he referred to St. Helen's Colliery Co. v. Hewitson and said:
"Although the test is the duty of the employee, to the employee this does not prevent 'things necessary and incidental to the employment' being covered by the language. So, if an employee is accidentally injured while eating his lunch on his employer's premises he may not strictly be performing any duty at the precise moment, but what he was doing is not separable from his work and the accident is deemed to have arisen in the course of the employment.