

How to manage key employment issues during times of unrest and looting

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Employers seeking an appropriate response to the civil unrest and public looting in Gauteng, KwaZulu-Natal and other parts of South Africa will have to consider different factual circumstances.



A general view of a burning warehouse in Durban, after protests erupted. 14 July 2021. Reuters/Rogan Ward

As a result of the civil unrest and public looting in Gauteng, KwaZulu-Natal and elsewhere, employers may face one of the following three scenarios:

Scenario 1	Scenario 2	Scenario 3
<ul style="list-style-type: none">• Employer has closed the workplace due to looting, violence and/or damage to property	<ul style="list-style-type: none">• Employer has closed the workplace as a precautionary measure to protect safety of employees and property	<ul style="list-style-type: none">• Employer has not closed the workplace but employees are too scared to report to work

Scenario 1: Employer has closed the workplace due to looting and/or damage to property

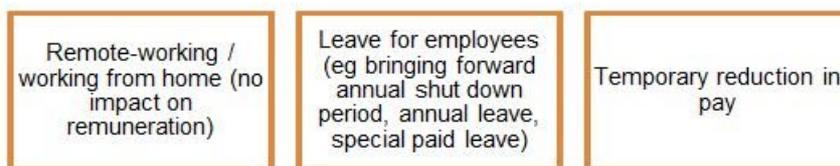
Employers have a general common law duty of care towards their employees. In addition, the Occupational Health and Safety Act (OHSA) places an express obligation on them to maintain a working environment that is free from any risk to the safety of employees, as far as reasonably practicable.

While it is clear that the looting and unrest and the risks to employee safety are not related to the work being performed or caused by the operations, in severe circumstances, protecting employees from risk may warrant the closure of some or all operations and requesting employees to stay away from work. Where employees are already at work, they should be reminded of emergency procedures, evacuation routes and security protocols.

The duty to ensure a safe working environment does not, under statute, extend to employees' travel to and from work in general, although in some circumstances it may fall within the employer's control, such as employer-arranged and controlled transport, travel for business purposes or travel required within the course and scope of the employees' employment. In taking a broad and responsible approach, employers should factor this safety into the risk assessments and planning in severe circumstances, such as the civil unrest at a scale witnessed over recent days.

Given the scale of the current protests, unrest and high propensity for violence, employers may consider implementing business travel policies and guidelines that limit employees' exposure to possible harm – and most importantly, as far as possible, implement a policy of "self removal" if employees are reasonably concerned for their safety.

Employers may be able to apply the no-work-no-pay principle to their employees on the basis of supervening impossibility of performance (ie the employer is prevented from performing in terms of the employment contract due to the civil unrest and public looting). Given the extraordinary circumstances surrounding the civil unrest and public looting, employers should consider the following alternatives:



There may also be governmental assistance/relief (similar to the Covid-19 Temporary Employer/Employee Relief Scheme) for affected employees. We will keep employers informed on developments.

The employer is obligated to ensure that its premises are fixed, inspected and authorised in line with all the required legislation such as the National Building Regulations, applicable standards and by-laws before it may be occupied by employees and ready for operation.

Where workplaces require industrial specific compliance with certain legislation, such as the major hazard installation (MHI) regulations, employers must comply with it before allowing employees back to the premises.

Scenario 2: Employer has closed the workplace as a precaution to protect safety of employees and property

Employers may decide to close the workplace as a precautionary measure. Since this is an employer-driven decision, employers should continue to remunerate their employees in full for the period of the precautionary closure. If this is not possible, employers should consult with their employees and agree with them on an appropriate alternative, which may include:

Remote-working / working from home (no impact on remuneration)

Leave for employees (eg bringing forward annual shut down period, annual leave, special paid leave)

Temporary reduction in pay

Scenario 3: Employer has not closed the workplace but employees are too scared to report to work

The employer will need to carefully evaluate the circumstances, on a case-by-case basis, when an employee(s) does not report to work due to safety concerns. Employers will need to assess whether this refusal is reasonable. The OHS Act permits employees to refuse to work if they believe that they are unsafe or endangered in the workplace.

If violence ensues at an employer's premises during operating hours, emergency protocols must be invoked and the protection and safety of employees must be of paramount importance. Failure to take steps to respond to a known risk to employee safety in the workplace, as far as possible, may amount to a breach of the OHS Act and possible related litigation.

In addition to the scenarios above, employers may also be required to deal with two further issues during this time:

Issue 1
• Dissemination by employees of inflammatory or false information via social media

Issue 2
• Employees involved in any criminal acts relating to the civil unrest / public looting

On both issues, even though we are in extraordinary circumstances, the usual employment law and health and safety considerations will apply. The employer must also have regard to its disciplinary code and procedure as well as its right to refuse work procedures or policies.

On dissemination of inflammatory or false information by employees on social media, the employer must carefully evaluate the conduct in terms of its social media policy. In both events, the employer must assess whether the conduct has an impact on the employer's reputation/business and the employment relationship.

On employees involved in any criminal acts relating to the civil unrest and public looting, the employer must also carefully evaluate the impact of the conduct on the employer's reputation/business and the employment relationship.

ABOUT THE AUTHOR

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