



# The Novel Coronavirus (COVID-19)

## *Guidance Document*

### SUDAN

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## I. INTRODUCTION

Amid a crisis like the COVID-19 pandemic, corporations are dramatically confronting the adverse implications of this outbreak. A team of MBAIH lawyers produced this document to support corporations in tolerating these challenging impacts whilst providing a healthy, sustainable and productive work environment.

The purpose of this document is to provide some legal guidance and insights to corporations, including:

- Precautions (Section II);
- Does COVID-19 stand as a *force majeure* event (Section III); and
- Employment implications (Section IV).

## II. PRECAUTIONS

In an attempt to reduce the spread of COVID-19 and keep up with social distancing rules, registration processes within the Commercial Registrations Department- Ministry of Justice is suspended to date, except the statement of the courts, prosecutors, committees, the Sovereign Counsel and competent ministers<sup>1</sup>. The courts are partially suspended subject to any applicable full lockdown<sup>2</sup>. A full lockdown in Khartoum city has declared by the High Committee for Health Emergency starting from 18 April 2020<sup>3</sup>. Pursuant to the pronouncements of the Minister of Information, the full lockdown is expected to last for three weeks in parallel with a holiday for the public and private sectors during the same period.

It is worth noting that the Sovereign Counsel declared the health emergency in response to the spread of COVID-19<sup>4</sup> and was followed by Emergency Decree No.1 issued by the Prime Minister which lists the crimes, contraventions and their respective fines. The Decree also extends the power of the police to include undertaking necessary procedures to enforce the decisions of the

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<sup>1</sup> Decision of the Commercial Registrations Department- Ministry of Justice no.7 and its extension dated 05 April 2020.

<sup>2</sup> The Chief Justice administrative guidance no.9 of 2020 dated 14 April 2020.

<sup>3</sup> The statement of the high committee for health emergency- Ministry of Health dated 14 April 2020.

<sup>4</sup> The Sovereign Counsel decree no.225 of 2020.

Competent Authority (i.e. the President of the Republic, the Governor, or his delegate<sup>5</sup>). In this regard, the fine for non-compliance with the Competent Authority's decisions is 5,000 Sudanese Pounds (SP).

### III. DOES COVID-19 STAND AS A *FORCE MAJEURE* EVENT

While the term 'pandemic/epidemic' may have been included in your contract among *force majeure* events, this does not necessarily mean that a contracting party is released from liability towards its non-performance.

The Sudanese Civil Act of 1984 (the **Civil Act**) provides two cumulative conditions that must be satisfied for an event to be considered *force majeure*, namely: (i) the event inevitably renders the performance of the obligation impossible<sup>6</sup>; and (ii) the event must be beyond the debtor's control. A party is not obliged to compensate the other party if the damage occurred due to a *force majeure* event, unless otherwise is agreed by the parties<sup>7</sup>.

A key criterion in determining whether the COVID-19 outbreak is a *force majeure* event, and not a comparable event such as *hardship*, is the inevitable impossibility to perform the obligation. Both *force majeure* and *hardship* events affect the performance of a contracting party. However, the distinction remains that while a *force majeure* event renders the performance of the obligation inevitably impossible, *hardship* does not prevent the performance of the obligation, but renders it more onerous<sup>8</sup>. Under the Civil Act, the performance of obligation is not onerous unless the loss exceeds one-third (1/3) of the obligation<sup>9</sup>.

Given the above distinction, the remedies under *force majeure* and *hardship* differ. Under *hardship*, the Civil Act renders the courts (or arbitral tribunals) the discretionary power to order the restoration of the economic equilibrium of the contract taking into consideration the interests of the contracting parties. Under *force majeure*, in which one party's performance of the

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<sup>5</sup> The definition of the Competent Authority under the Emergency and public safety protection law of 1997.

<sup>6</sup> Article 130 of the Civil Act.

<sup>7</sup> Article 141 of the Civil Act.

<sup>8</sup> Article 117.1 of the Civil Act.

<sup>9</sup> Article 117.2 of the Civil Act.

obligations becomes impossible, the other party is accordingly released from its obligations and the contract therefore is automatically rescinded<sup>10</sup>. However, we are of the view that the courts (or arbitral tribunals) have the discretionary power to either rule (i) the rescission of the contract, thereby releasing the contracting parties from performing their obligations, or (ii) the suspension of the non-performed obligation until the expiration of the *force majeure* event if possible. Whether a court rules (i) the rescission or (ii) the suspension will mainly depend upon the extent of impossibility.

In the case of COVID-19, impossibility of performing contractual obligations will likely depend on the magnitude of a given city's lockdowns and/or shutdowns of relevant businesses, which accordingly would either make performance of an obligation either inevitably impossible in whole or in part.

In summary, as long as there is an impossibility to perform the obligation, the defaulting party may invoke the provisions of *force majeure*. It is important to note that the defaulting party is the one who bears the burden of proving such impossibility.

*Force majeure* and/or *hardship* related-advice:

- It is recommended to check the processes required for a *force majeure* notice under relevant contracts (the timeframe required to serve this notice and details of how COVID-19 impaired any performance, such as the magnitude of the impact and the time to expected to resume performance).
- It is advisable for the contracting parties, as is practicably reasonable, to mitigate the impact of COVID-19.
- It is advisable that upon entering into contracts amid the crisis of COVID-19 to take into account the ramifications of COVID-19.

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<sup>10</sup> Article 130 of the Civil Act.

#### IV. EMPLOYMENT IMPLICATIONS

As mentioned above, a full lockdown in Khartoum city has been declared by the High Committee for Health Emergency starting from 18 April 2020<sup>11</sup>. Pursuant to the pronouncements of the Minister of Information, the lockdown is expected to last for three weeks in parallel with vacation for the public and private sector for the same duration.

Generally, the aforementioned Emergency Decree No.1 issued by the Prime Minister provides for fine penalties in case of, among other things, non-adherence to medical examination (SP 10,000), isolation (SP 20,000), or quarantine (SP 5,000) as applicable.

Private sector companies have been left to take the measures they deem necessary to limit the spread of infections at the workplace, while simultaneously ensuring they remain compliant with the Sudanese Labor Law of 1997 (“**Labor Law**”). Accordingly, for ease of reference, we have set out below the different courses of action that could be adopted by employers to counter these challenging times and arranged them in order from most to least recommended.

##### **Safety of the Workplace**

Many employers have already imposed a working from home policy, as the nature of their work permits. If business operations cannot be conducted remotely, it is advisable that employers take the necessary precautions and measures to maintain a safe work environment. Generally, the Labor Law requires manufacturers to keep the employees informed with the work risks and the means to avoid them, in addition to undertaking the necessary precautions to protect employees from industrial incidents and work diseases<sup>12</sup>. Typically, employers shall undertake the necessary precautions to maintain the safety of the employees.

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<sup>11</sup> The statement of the high committee for health emergency- Ministry of Health dated 14 April 2020.

<sup>12</sup> Article 94 of the Labor Law.

It is worth noting that by way of exception the Labor Law allows the employer to assign the employee to perform work that is substantially different from the agreed work under the labor contract in case of *force majeure*, provided that such assignment shall not exceed two weeks<sup>13</sup>.

Additionally, the World Health Organization has set out some guidelines for safeguarding the workplace, which may be beneficial<sup>14</sup>.

## Leave

Employers may opt to place some of their employees on leave, regardless of whether or not they have contracted the virus, in order to limit crowding at the workplace, in accordance with the following:

- i. **Sick Leave.** The Labor Law permits employees to take sick leave under the following conditions: (i) the employee has been diagnosed with an illness, as evidenced by a medical certificate and not as a result of the employee’s bad behavior or negligence; and (ii) the employee has already completed a period not less than three months in regular work. Should both these conditions be satisfied, the employee is granted the right to sick leave with salary compensation throughout their illness period. Pursuant to the Labor Law, the employees’ salaries will be paid as follows during the sick leave:
  - the first three months are payable at 100% of the salary;
  - the second three months are payable at 50% of the salary; and
  - the third three months are payable at 25% of the salary<sup>15</sup>.

The employee shall not enter sick leave with a discounted salary unless the employee has already exhausted his or her vacation leave, excluding sick leave<sup>16</sup>. The Labor law does not set a limit on the duration of sick leave, however, if an employee has used the above

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<sup>13</sup> Article 32 of the Labor Law.

<sup>14</sup> World Health Organization, “Getting your workplace ready for COVID-19” ([https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?sfvrsn=359a81e7\\_6](https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?sfvrsn=359a81e7_6)) dated 3 March 2020.

<sup>15</sup> Article 47.1 of the Labor Law.

<sup>16</sup> Article 47.2 of the Labor Law.

three periods of sick leave, he or she will begin unpaid sick leave until the employee passes a medical examination within a reasonable period in order to determine his or her ability to work<sup>17</sup>.

**ii. Annual Leave.** Employees are entitled to the following annual leave schemes only after having worked for at least one year under the work:

- If the employee has worked between one to three years, he or she is entitled to 20 days of annual leave;
- If the employee has worked between eight to fifteen years, he or she is entitled to 25 days of annual leave; and
- If the employee has worked for 15 years or more, he is entitled to 30 days annual leave<sup>18</sup>.

The employee and employer have the right to mutually agree to postpone all or part of the employee's annual leave to the following year, as long as the postponement does not exceed one year.

**iii. Unpaid Leave.** Although it is not explicitly mentioned under the Labor Law, we understand that if the annual leave balance of the employees has been exhausted, employers may still place the employees on unpaid leave upon written agreement with them. In other words, the Labor Law does not explicitly prevent unpaid leave, and thus it may be mutually agreed between the employer and the employee.

### Changing Work Conditions

We note that the Labor Law does not explicitly prevent the temporary deviation of work conditions in case of *force majeure*, accordingly employers may temporarily modify the working conditions to meet their needs and ensure the safety of their employees.

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<sup>17</sup> Article 47.3 of the Labor Law.

<sup>18</sup> Article 44.2 of the Labor Law.

For your reference, we have listed below examples of the types of modifications that may be made at the workplace:

- assigning the employees to work that is different from the agreed upon scope of work, as long as it is not fundamentally different in nature;
- scheduling the employees' days off throughout the week, instead of the agreed upon days off, in order to avoid having the entire workforce on the premises at the same time; and/or
- adopting shift based working hours, if the nature of business allows it, while taking into consideration the curfew imposed by the Government, as well as the closure of all public and private transportation.

## Lay-Offs

- i. **Reduction.** The Labor Law grants employers the right to submit a request to the competent authority to reduce the number of employees or close down the work place for economical or technical reasons. The competent authority will present this request to the competent committee, which shall issue its decision within three weeks from the date of receipt of the request<sup>19</sup>.

If the Governor agrees to close a work place or reduce the number of employees, the employer has the right to execute the Governor's decision without prejudice to the employees' rights including their right to a be served with a notice. The employer has the same right if the Governor does not respond to his request after four weeks from the date of receipt of the employer's request without prejudice to the employees' rights including the notice<sup>20</sup>. If the employer proceeds without respecting the above procedures, the employee shall be entitled to get back to work with his or her full salary for the duration of the work suspension, in addition to a compensation equal to a basic salary of six months<sup>21</sup>.

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<sup>19</sup> Article 56.1,2, and 3 of the Labor Law.

<sup>20</sup> Article 56.4 of the Labor Law.

<sup>21</sup> Article 56.5 of the Labor Law.

- ii. **Termination.** Termination of employment contracts is quiet strict under the Labor Law. The Labor Law lists the cases in which an employer is permitted to terminate an employee's work contract, upon serving a notice. These conditions include, but are not limited to: (1) inability of the employee to perform the work, or (2) illness for a period exceeding the annual sick leave, whether paid or unpaid, (*N.B.* such inability must be proven by virtue of medical examination); and (3) written agreement between the employer and the employee. Furthermore, the Labor Law lists other cases in which an employer has the right to terminate the employee's labor contract without serving a notice. These cases include, but are not limited to: (1) if the employee commits a fault due to his gross negligence that results in gross loss for the employer, (2) the employee's non-compliance with the safety instructions of the establishment although he was notified in writing, provided that such instructions are written and outstanding in a visible area.

Generally, the Labor Law provides for compensation to the employee following the termination of the labor contract by the employer, as follows:

- if the employee worked for a period not less than three years and not exceeding ten years, the employee is entitled to a compensation equal to one month basic salary for each year of work;
- if the employee worked for a period more than ten years, the employee is entitled to a compensation equal to one and half month basic salary for each year spent working after the employee's fifth year of working. If the employee worked for more than fifteen years, the employee is entitled to one and three quarters month basic salary for each additional year. The compensation shall not exceed the basic salary of 36 months<sup>22</sup>.

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<sup>22</sup> Article 60.1 (a) and (b) of the Labor Law.

With the safety of our dedicated lawyers and clients as top priority, we stand ready to help clients through the unprecedented times ahead of us. For further support or query, please contact us.

Stay safe and healthy.

Sincerely yours,

Matouk Bassiouny in association with AIH law firm.

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