

HEALTH AND SAFETY IN WORK FROM HOME CONTEXT

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Working from home....



AGENDA

Introduction

- Agenda (the What)
- Presenters (the Who)
- Sources of Law (the Where)

Prelude and Context

Content

- Right to be Kept Safe at Work / Duty to Mitigate Dangers
- Having the Boss over: Home Risk Assessments
- Dangerous machinery, equipment, pets, spouses, children and other new home-based workplace hazards
- Employee Mental Wellness
- COIDA @ Home

Brief Conclusion

Q&A

Government: work from home Surgeons:



INTRODUCTIONS: PRESENTERS



- RSI is a public-interest law firm that specialises in human rights relating to occupational health and safety, and their related compensation aspects.
- RSI is perhaps best known for its landmark class actions against the gold mining industries for causing mineworkers to develop the occupational diseases Silicosis and PTB, *Nkala and Others v Harmony Gold and Others*.
- RSI is also more recently known for its work in the review application of *AMCU v Minister of Minerals and Others*, which forced the Department of Minerals to do more to safeguard mineworkers from SARS-CoV-2 and Covid19. Resulting in the Guidelines.
- RSI has been involved in numerous other precedent setting and important cases over the last decade, i.e. strict liability under OHSA, listeriosis outbreaks, purpose of workplace enquiries, and the development of workmen's' compensation jurisprudence.
- RSI has Offices in Johannesburg and White River.
- RSI frequently acts on contingency and *pro bono* basis – from former South African Presidents to struggling widows – but is also frequently instructed by companies and government departments to assist them in matters relating to human rights.

PRESENTERS CONTINUED

- **George Ivor Butela Kahn – Senior Associate**

Kahn has practiced law for more than a decade, specialising in health and safety, and its related compensation aspects, constitutional and administrative law, complex litigation, and has been directly or indirectly involved in numerous important judgments over the years.

Kahn read for his science degree at UCT (almost following his father Dr Rhett S. Kahn (DOH) into medicine) and then further read for his humanities and law degrees at Rhodes (instead following the late Prof Ellison Kahn and CCMA Director Nerine Kahn into law). Kahn has further read postgrad advanced administrative law, information law and human rights in business at Wits. Kahn has majors in Law, Philosophy, Politics, Psychology and Molecular Biology, with minors in Economics, Sociology, History, and a variety of other science and medical subjects. Kahn was taught virology by Prof Ed Rybicki of the UCT Bio Pharming Research Unit (Prof Rybicki lectured him on coronaviruses and vaccinations).

Kahn grew up in the Goldfields, Welkom & Virginia, FS, where his father is a well known occupational medical practitioner and a certified independent medical examiner.

Kahn is assisting Prof Paul Benjamin in updating the Commentary on the Occupational Health and Safety Act and Compensation of Occupational Injuries and Diseases Act.

WORK FROM HOME

General Law

Constitution of the Republic of South Africa,
1996

Occupational Health and Safety Act, Act
85 of 1993 (“OHSA”)

- Regulations for Hazardous Biological Agents, 2001
- Environmental Regulations for Workplaces, 1987
- Health and Safety of Children at work regulations and BCEA regulations on hazardous work by children, 2010: clause 4 (children may not perform work where adult is required to wear face masks for)
- Ergonomics Regulations, 2018 (equipment required to eliminate/reduce/mitigate adverse health effects of SARS-CoV-2, i.e. desk shields)
- General Safety Regulations, 1986 (Alcohol at work and working in confined spaces)
- Etc.

SOURCES OF
LAW:
COVID19

WORK FROM HOME

Extractive Industry?





Underground Wi-Fi makes coal mining safer and more productive

May 22, 2019 | Breaking News | by Claus Hetting, Wi-Fi NOW CEO & Chairman



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Mine Health and Safety Act, Act 29 of 1996 ("MHSA")

- Section 102 (Definitions)
 - "Employee" means any person who is employed or working at a mine.
 - "Mine" means any a works or other place where a mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploiting or processing of a mineral, or for health a n d safety purposes. (but see definition of mining area in Mineral and Petroleum Resources and Development Act)
 - "Works" means any place, excluding a mine, where any person carries out
 - (a) Transmitting and distributing to another consumer of any form of power from a mine (Remote technology?)
 - (b) Training at any central rescue station
 - (c) The making, repairing, re-opening or closing of any subterranean tunnel
 - (d) Any operations necessary or in connection with any of the operations listed in this paragraph (IT or payroll?)
 - "organism" any biological entity which is capable of causing illness to persons
 - "serious illness" incapacities affected person for four or more days.
- Guidelines for a Mandatory Code of Practice on the Mitigation and Management of the COVID-19 Outbreak, 2020 (DMR compelled by the Labour Court to issue and requires modifications of other related Codes of Practices).

SOURCES OF
LAW
CONTINUED

Compensation of Occupational Injuries and Diseases Act, Act 130 of 1993 (“COIDA”)

- Item 1.3.1 of Schedule 3 of the Act, read with section 66, presumes that diseases caused by infectious agents (including viruses), and in occupations at particular high risk of contamination, are occupational and under the Act, unless otherwise rebutted.

Unemployment Insurance Act, Act 63 of 2001 (“UIF”): illness and maternity benefits

Basic Conditions of Employment Act, Act 75 of 1997 (“BCEA”): sick leave is not deducted if an occupational disease under COIDA (s24)

SOURCES OF LAW CONTINUED

Disaster Management Act, Act 57 of 2002

- Covid19 Lockdown regulations and notices from 15 March 2020
- Regulations to address, prevent and combat the spread of Coronavirus COVID-19: Adjusted alert levels, as amended from time to time.
- Coronavirus COVID-19 Temporary Employee/Employer Relief Scheme (TERS) benefits for certain categories of employees, dated 20 April 2021
- Consolidated Coronavirus COVID-19 Direction on Occupational Health and Safety Measures in Certain Workplaces, dated 4 June 2020
- The numerous sector directions, i.e. public transport, forestry, personal care services, courts, sport, etc.
- Previous regulations, notices, directions, guidelines and circulars under this Act.

SOURCES OF
LAW
CONTINUED

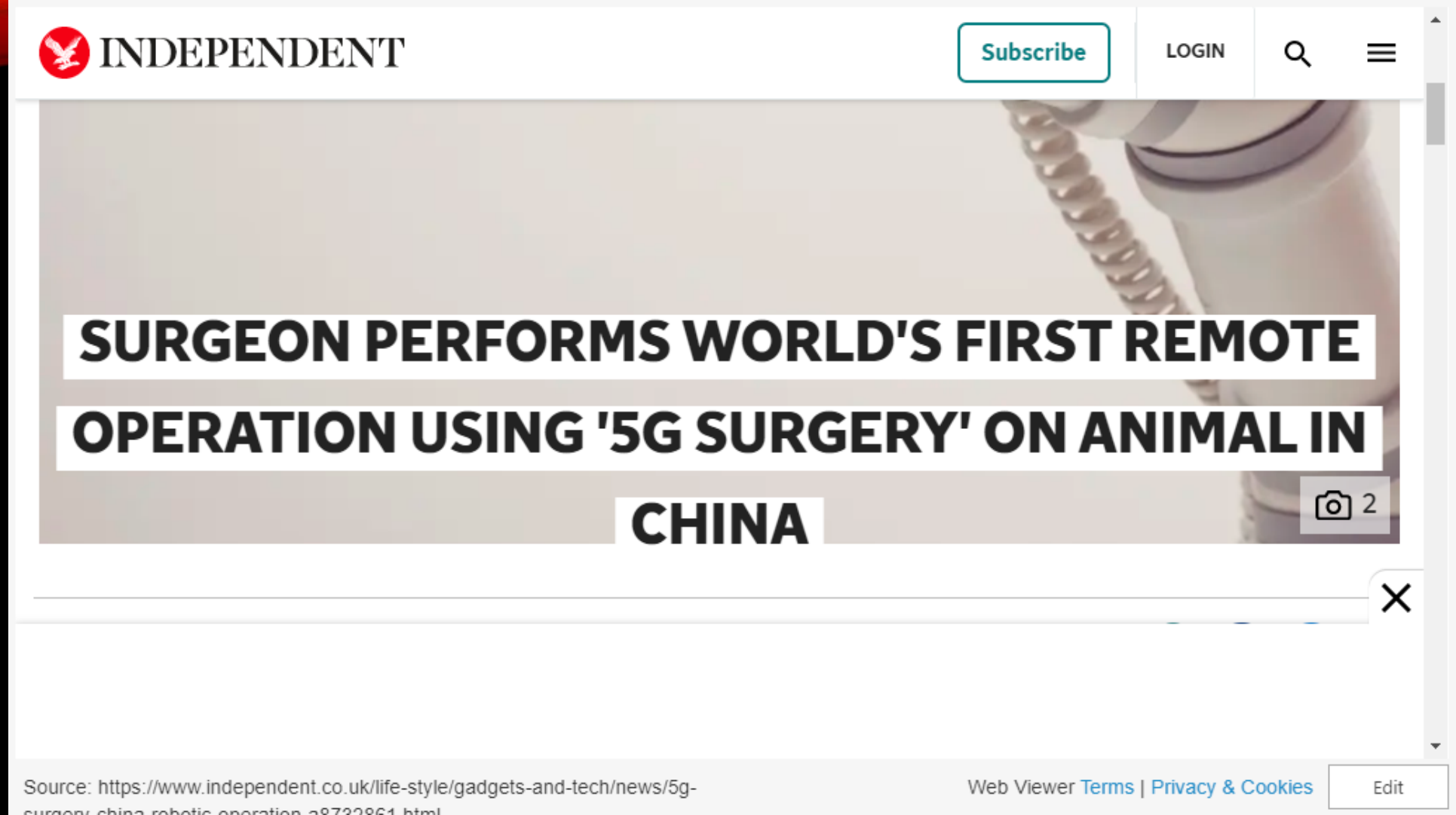
Common Law (IMPORTANT TO NEVER FORGET)

- Hybrid of Roman-Dutch and English Law
- The Right to Refuse Dangerous Work and the Duty of Care towards Workers



The OHS Act and MSHA do not replace the common law, but augment and supplement it rather, i.e. OHS Act does not include a statutory right to RRDW but the right persists under the common law duty of care towards both miners and non-miners by their employers. The common law right to Right to Refuse Dangerous Work is broader than the statutory right to RRDW under the MSHA for miners.

The COIDA's section 35 also does not bar workers employed under labour brokers from suing their broker's client, the principal, since they are not the workers' contractual employer and the common law is then applicable for these occupational diseases' claims.


SOURCES OF LAW CONTINUED



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PRELUDE AND CONTEXT

- Covid19 and SARS-CoV-2 are novel occupational health and safety concerns that are not without legal frameworks, some existing (i.e. the HBA regulations, others brought about through emergency powers (i.e. Disaster Act Covid19 Regulations) and still others 'clarify' the Covid19 situation (i.e. Directive on Covid19 as an occupational issues, read with Schedule 3 of COIDA).
- Rights always have a corresponding and auxiliary Duty – a two-way street (i.e. section 34 of the Bill of Rights ensures Right of Access to Courts; Duty not to exercise Self-Help)
- Liberal Rights vs Social Democratic Duties (A fundamentally public and occupational health matter vs absolute individual freedoms)
- Employee Rights are understood through an Objective Lens (Rational and Evidenced Based), and not Subjective Opinions.
- Technology and Covid19 have changed our understanding of where work is done. This is the beginning of a massive workplace reform, not a temporary situation. Other jurisdictions are leading the way in teleworking, telecommuting and/or remote working and the International Labour Organisation is already considering these issues.

PATERSON JOB GRADINGS

- Not all employees can work from home, this will be dependant on the nature of their work.
- Some laws prohibit certain careers from functioning at home: i.e. butchers, pharmacists, etc.
- Some careers are inherently home-bound: domestics, baby-sitters, care workers.
- In most instances it will be professionals that will be required to work from home: lawyers, bankers, engineers, academics, actuaries, educators, etc.
- However, it does not take long to realise that almost every level of the Paterson Job Grading is implicated: secretaries, data capturers, call centre agents, tailors, artisans, artists, bakers, wedding planners, etc.
- The risk assessments required for each career will likely be specific to that career's challenges and dangers: carpal tunnel syndrome, stove burns, depression, etc.

PROFESSIONAL HOME

- The OHS Act defines a workplace as any premises or place where a person performs work in the course of his employment. See also the MSHA section 102 "working place" means any place at a mine or mining area where employees work.
- Our courts have repeatedly stated that there is no hard and fast rule as what 'within the scope and course of one's employment' means, it must be considered on a case by case basis (and usually within the context of the Compensation of Occupational Injuries and Diseases Act and its predecessors)
- For example, being carried off by an angry group of protestors to be thrown off the roof of the local government building is not within the scope and course of employment for municipal officials service delivery issues notwithstanding - *Churchill v Premier of Mpumalanga and Another* (889/2019) [2021] ZASCA 16; [2021] 2 All SA 323 (SCA); (2021) 42 ILJ 978 (SCA) (4 March 2021)



EMPLOYER TO CONDUCT RISK ASSESSMENT AND MONITOR DANGERS

- Health and Safety legislation mandates all employers to conduct risk assessments of all workplaces that its employees may perform their work for the employer. This includes, by implication, the employee's own home in certain instances.
- A balance must be achieved between fulfilling the purposes of the legislation – identifying and mitigating occupational dangers – and the privacy of the employee.
- In some instances it may be acceptable for the employee to report requested information to the employer, rather than an in-person inspection of the 'workplace'.
- When dealing with HBA categories 3 & 4 (including Covid19), it is also necessary for the employer to monitor the home situation and report any incidences of disease (Covid19 compliance officers)

OBJECTIVE RISK ASSESSMENT

- Both the OHSA and MHSA require employers to conduct an objective risk assessment at the workplace. (Privacy rights in the context of WFH?)
- However it is the Employee that must prove there is an objective danger when exercising their right to refuse dangerous work – See *NUM & others v Chrober Slate (Pty) Ltd* [2008] 3 BLLR 287 (LC)

“[32] The question whether the quarry was safe requires evidence of a technical nature, expert testimony as it were. There is no evidence to show how the working place was in November 2005.

[33] The onus is on the [employees] to prove this fact. They allege that the quarry was unsafe, hence they withdrew their labour. He who alleges must prove. It cannot be so as [counsel for the employees] argued that the onus is on the [employer] on this aspect. I agree with [counsel for the employer] that the onus rests on the [employees].”

- *Chrober Slate* correct in the context of WFH, but not clear that it still requires expert testimony.

THE RIGHT TO A SAFE WORKING ENVIRONMENT

- All employees and non-employees (customers, clients, contractors, etc.) have a right that the employer (the owner of the mine in mining terms) must take all “Reasonably Practicable” measures to safeguard them. This is duty on the employer is codified in both the OHSA (s8) and MHSA (s5).
- In other more developed jurisdictions this duty creates a reverse onus upon the employer in questions of liability - See *Edwards v National Coal Board* [1949] 1 KB 704; [1949] 1 All ER 743: (the principal English Law precedent on the concept)

“Reasonably practicable is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the [employer] in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the [employer] discharge the onus on them.”

— Lord Justice Asquith

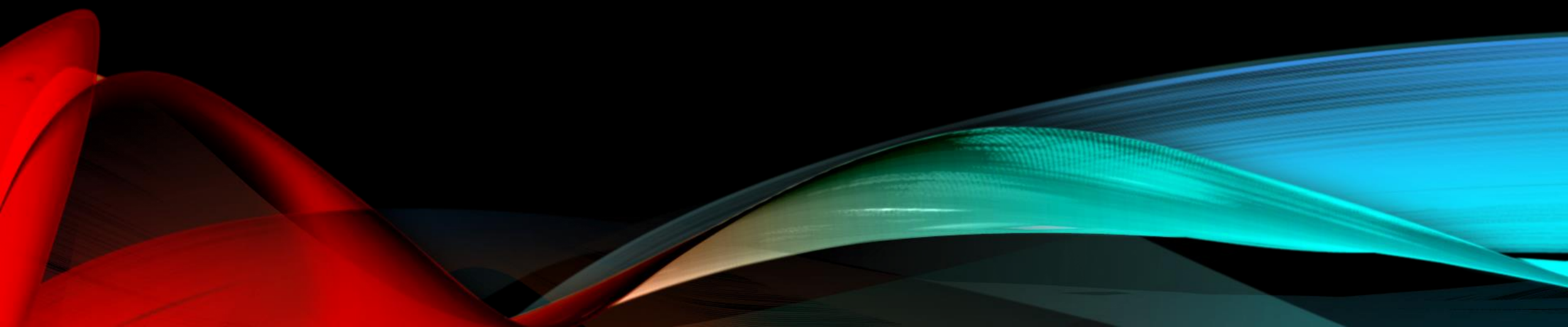
- This right is a constitutional right that cannot be alienated, ceded or compromised.

THE RIGHT TO A SAFE WORKING ENVIRONMENT CONTINUED

- Employees may not be dismissed for insisting upon an objectively safe working environment and the refusal to work in an objectively unsafe environment does not constitute abandonment.
- Employees may not be dismissed for refusing objectively unsafe work – see, for example, the cases of:
 - *October v Teleperformance SA (Pty) Ltd* [2021] 4 BALR 426 (CCMA) (an employee was reinstated after a dismissal for refusing to come back into work after a colleague tested positive for Covid19)
 - *Beck v Parmalat SA (Pty) Ltd* [2021] 2 BALR 131 (CCMA) (an employee was reinstated after a dismissal for going AWOL due to a disclosed danger the virus may objectively pose to her family of vulnerable persons, i.e. asthma)

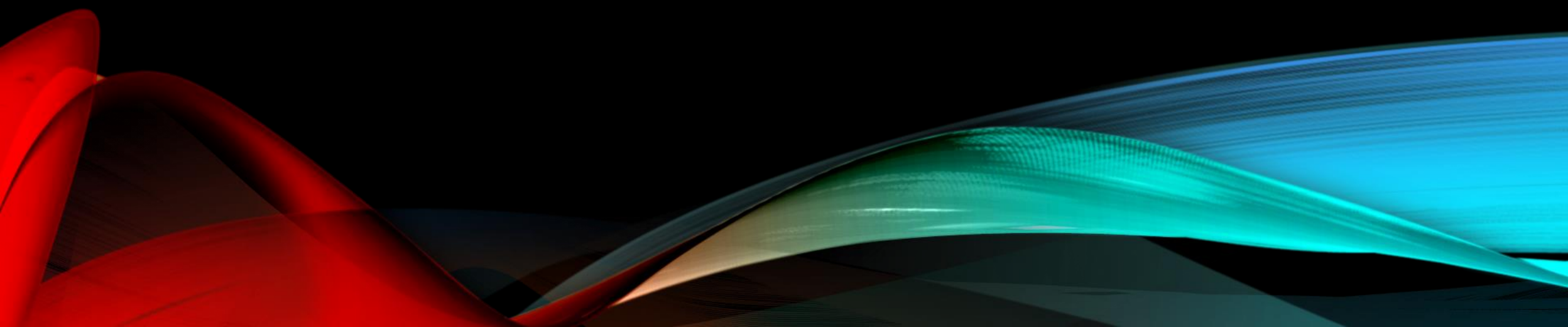
CAN AN EMPLOYER INSIST THAT A COVID19 POSITIVE EMPLOYEE CONTINUE WORKING?

Where the employee is asymptomatic or experiencing minimal discomfort, and able to function from home?



CAN AN EMPLOYER INSIST THAT A COVID19 POSITIVE EMPLOYEE CONTINUE WORKING?

Where the home environment does not comply with the health and safety regulations or is otherwise unsafe?



HOME RISKS – NON EXHAUSTIVE

Infrastructure

Ergonomic Regulations

- Adequate workspace
- Dangerous machinery (sewing machine, etc.)
- Ergonomic work systems
- Fire equipment
- First Aid kit
- Access to emergency healthcare
- Privacy (Webcams?)

Environmental

Environmental Regulations

- Adequate lighting
- Adequate temperature
- Adequate ventilation
- Noise and hearing conservation
- Flooding precautions
- Fire precautions

Other relevant health standards

- Food poisoning from home industries, etc.

Social

- Mental Illness
- Violent or intimidating neighbourhood
- In-house workers
- Opportunity of social transmission of disease
- Domestic violence

MENTAL ILLNESS

- Humans are a social species, and need social connection.
- Substance abuse experts and organisations explain that the opposite of substance abuse is social connection.
- Medical authorities and experts are cautioning about the implications for mental health under Covid19.
- Employers are obligated to check in with employees to see how they are doing, but should engage a little bit more than simply enquiring whether the employee has any Covid19 symptoms.
- A bit of small talk keeps the blues away. A sense of humour should be encouraged, within reason (I changed my boss's filters to show him with funny ears... I may have gone a bit too far).
- Larger organisations should encourage HR or psychological services to check-in on everyone.

THE DUTY TO COOPERATE WITH THE EMPLOYER UNDER A PANDEMIC

- Employees must cooperate with Employers when trying to eliminate, reduce or mitigate dangers caused by the SARS-CoV-2, i.e. regular screening, face masks, desk shields, e-meetings, etc.
- **Article 19(a) of the Occupational Safety and Health Convention, No. 155 of 1981, states that workers are legally obligated to cooperate with their employer to secure a safe and healthy working environment.**
- But this does not mean the employers can unilaterally change the employee benefits, i.e. salary rates, without prior consultations and agreements under Covid19 – see *Macsteel Service Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa and Others* (J483/20) [2020] ZALCJHB 129; [2020] 8 BLLR 772 (LC) ; (2020) 41 ILJ 2670 (LC) (3 June 2020).

COIDA @ HOME

- The Constitutional Court has already confirmed that home incidents within the scope and course of a person's employment may invoke the Compensation of Occupational Injuries and Diseases Act: *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) – Domestic Workers

“... Ms Mahlangu drowned in her employer's pool in the course of executing her duties. Her body was found floating in the swimming pool by her employer who had been present in the home at the time of the incident, but asserted that he heard no sounds of a struggle. It is alleged that Ms Mahlangu was partially blind and could not swim, which resulted in her drowning...”

WHAT IS AN OCCUPATIONAL HOME INJURY?

- No easy answer, our courts have struggled with this question in the broader context of industrial workplaces for about a century. Case by case consideration is required.
- The injury must arise or be aggravated by conduct done within the scope and course of one's employment – the conduct must be aimed at furthering the business of the employer.
- For example, a seamstress losing a digit or a home baker suffering 3rd degree burns from their work in producing products for sale.
- Less clear situations exist, worker gets vocal on phone with difficult supplier / client and dog bites him out of sudden fright (don't laugh it happens).
- It is the duty of the employer to report the incident no matter how absurd or ridiculous, the responsibility of deciding whether it is occupational or not rests with the Compensation Commissioner alone and not the employer.

CONCLUSION

Many employees work from home and their safety remains an employer's concern.

Employer must conduct a risk assessment of all workplaces, from factory floors to the study at home.

Right to a safe work environment must be balanced with the right to privacy; the employer and the employee must coordinate in this regard.

The employee's home work environment and ability to perform safe work remains a joint responsibility of the employer and employee.

Mental Illness is an important aspect of Work-From-Home that must not be overlooked.

Occupational injuries from home-based work still fall under COIDA.



QUESTIONS

Thank you

