

NEDLAC / NIOH COVID-19 LEGACY

Topic: Medical Incapacity Related to Covid-19

Thursday 14 March 2024 10h00 -10h30

Medical Incapacity related to Covid-19:
*A brief Overview of Selected Key Aspects
of the Applicable Law and Relevant
Employee Benefits*

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SA Law Reform Commission Member Project 148: Domestication into SA law of the UN Convention on the

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Topics I'm Asked to Cover

- When is an employee regarded as medically incapacitated with COVID-19?
- What are employer responsibilities in dealing with medical incapacity (what needs to be in place, who are the role players and what are their responsibilities?)
- Costing – when does the employee pay and when does the employer pay?
- What are the employee responsibilities when an employer is managing them for incapacity?
- How does sick leave work with incapacity (short term and long term incapacity)
- What does medical boarding mean? Who assesses it and how is it assessed?

Post-Covid-19 impairments

Mounting research shows that Covid-19 leaves its mark on the brain, including with significant drops in IQ scores (Ziyad Al-Aly - Chief of Research and Development at the VA St. Louis Health Care System and a Clinical Epidemiologist at Washington University in St. Louis.)

https://www.dailymaverick.co.za/article/2024-03-05-mounting-research-shows-that-covid-19-leaves-its-mark-on-the-brain-including-with-significant-drops-in-iq-scores/?utm_term=Autofeed&utm_medium=Social&utm_source=LinkedIn#Echobox=1709897233

and

‘Cognition and Memory after Covid-19 in a Large Community Sample’

Adam Hampshire, Ph.D., Adriana Azor, Ph.D., Christina Atchison, Ph.D., William Trender, M.Res., Peter J. Hellyer, Ph.D., Valentina Giunchiglia, M.Sc., Masud Husain, Ph.D., Graham S. Cooke, Ph.D., Emily Cooper, M.A., Adam Lound, M.Sc., Christl A. Donnelly, Ph.D., Marc Chadeau-Hyam, Ph.D. New England Journal of Medicine, February 29 2024 390: 806-81

<https://www.nejm.org/doi/10.1056/NEJMoa2311330>

“significant deficits in memory and executive task performance”

- “from the very early ... pandemic, **brain fog emerged as a significant health condition** that many experience after Covid-19”
- “there is now abundant evidence that being infected with SARS-CoV-2 – the virus that causes Covid-19 – can affect brain health in many ways.”
- “Covid-19 can lead to an array of problems, including headaches, seizure disorders, strokes, sleep problems, and tingling and paralysis of the nerves, as well as several mental health disorders.”
- “new study in the New England Journal of Medicine into memory, planning and spatial reasoning in nearly 113,000 people who had previously had Covid-19 ... found that those who had been infected had **significant deficits in memory and executive task performance.**”
 - “mild and resolved Covid-19 showed cognitive decline equivalent to a three-point loss of IQ”
 - “unresolved persistent symptoms, such as people with persistent shortness of breath or fatigue, had a six-point loss in IQ”
 - “admitted to the intensive care ... had a nine-point loss in IQ”
 - “Reinfection with the virus contributed an additional two-point loss in IQ, as compared with no reinfection”

Ziyad Al-Aly - **Mounting research shows that Covid-19 leaves its mark on the brain, including with significant drops in IQ scores** (Chief of Research and Development at the VA St. Louis Health Care System and a Clinical Epidemiologist at Washington University in St. Louis.)

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“poor memory and difficulty thinking or concentrating”

- “141,583 participants who started the online cognitive assessment, 112,964 completed it”
- “**poor memory and difficulty thinking or concentrating** (commonly referred to as “brain fog”) have been implicated in syndromes occurring after coronavirus disease 2019 (Covid-19) — a situation that has led to suggestions that Covid-19 may have lasting cognitive consequences”
- “In this large community-based study, we found that **Covid-19 was associated with longer-term objectively measurable cognitive deficits**”
- “In this observational study, we found **objectively measurable cognitive deficits that may persist for a year or more after Covid-19**. We also found that participants with resolved persistent symptoms had small deficits in cognitive scores, as compared with the no-Covid-19 group, that were similar to those in participants with shorter-duration illness. **Early periods of the pandemic, longer illness duration, and hospitalization had the strongest associations with global cognitive deficits**.
- “The implications of longer-term persistence of cognitive deficits and their clinical relevance remain unclear and warrant ongoing surveillance.”

‘Cognition and Memory after Covid-19 in a Large Community Sample’

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When is an employee regarded as medically incapacitated with COVID-19?

Labour Relations Act – “*incapacity*”

Employment Equity Act –
“*disability*”

LRA's "Code of Good Practice: Dismissal"

- Code of Good Practice: Dismissal ("Dismissal Code") is Schedule 8 to the Labour Relations Act ("LRA")
- LRA provides for Dismissal Code in LRA section 203
- Dismissal Code is issued & prepared by NEDLAC
- LRA section 203(3): *"Any person interpreting or applying LRA must take into account any relevant Code of Good Practice"*
- In Dismissal Code are provisions section 10(1) - (4) and section 11 for ill-health "incapacity"

Dismissal Code: Types of Ill-Health/ Injury

“Incapacity on the grounds of ill health or injury may be

- **temporary**

or

- **permanent”**

If the employee is *temporarily* unable to work ..

- “... the employer should **investigate the extent** of the incapacity or the injury”
- If the employee is likely to be absent for a time that is unreasonably long ... **investigate all the possible alternatives short of dismissal**

When alternatives are considered, relevant factors might include

- the nature of the job
- the period of absence
- the seriousness of the illness and
- the possibility of securing a temporary replacement for the ill or injured employee

EEA Definition of disability: section 5

- 5.1.1. (i) Forms of disability
- 5.1.1 (ii) Physical impairment
- 5.1.1. (iii) Mental impairment
- 5.1.2. (i) Long term
- 5.1.2 (iii) Recurring impairment
- 5.1.3. (i) Progressive conditions
- 5.1.3. (i) Substantially limiting
- 5.1.3. (ii) Controllable & correctable impairments
- 5.1.3. (iii) Assessing if substantially limiting
- 5.1.3 (iv) Impairments excluded by public policy

Employer responsibilities in dealing with medical incapacity

LRA :S10(1) Temporary Incapacity

When alternatives are considered, relevant factors might include

- the nature of the job
- the period of absence
- the seriousness of the illness and
- the possibility of securing a temporary replacement for the ill or injured employee

TEMPORARY INCAPACITY

EMPLOYEE'S OWN OCCUPATION

INVESTIGATE EXTENT

10(1); NOTE : 11 (a)

INVESTIGATE DEGREE

10 (3); NOTE : 11 (a)

CONSIDER RELEVANCE OF THE CAUSE 10 (3)

SPECIFIC CONSIDERATION : WHETHER ILLNESS OR INJURY WAS WORK RELATED

10 (4)

IF THE ABSENCE PERIOD IS NOT UNREASONABLY LONG

IF THE ABSENCE PERIOD IS UNREASONABLY LONG

10 (1)

IF THE ABSENCE PERIOD IS NOT UNREASONABLY LONG

SICK LEAVE, ETC.

EFFECTS OF ABSENCE ARE MANAGED

INCAPACITY RESOLVES

EMPLOYEE RETURNS TO WORK

IF THE ABSENCE PERIOD IS UNREASONABLY LONG

10(1)

INVESTIGATE ALL THE POSSIBLE ALTERNATIVES SHORT OF DISMISSAL

10 (1)

Factors relevant : 10 (1)

- **NATURE OF THE JOB**
- **PERIOD OF ABSENCE**
- **SERIOUSNESS OF ILLNESS**
- **TEMPORARY REPLACEMENT**

IF A POSSIBLE ALTERNATIVE IS IDENTIFIED & IS SUCCESSFUL

**SICK LEAVE/
DISABILITY**

**ALTERNATIVE
APPLIED**

IF A POSSIBLE ALTERNATIVE IS NOT IDENTIFIED / IS NOT SUCCESSFUL

**ILL-HEALTH
RETIREMENT**

**DISABILITY
BENEFIT**

**RETRENCHMENT
PAYMENT**

**TERMINATION DUE TO INCAPACITY
IN FORM OF ILL_HEALTH**

LRA S10(1): Permanent Incapacity

- “In cases of **permanent incapacity**, the employer should
- ascertain the possibility of securing **alternative employment**, or
 - **adapting the duties** or
 - **work circumstances** of the employee
- to accommodate the disability”

PERMANENT INCAPACITY

10 (1)

INVESTIGATE THE *EXTENT* OF THE INCAPACITY

10(1); NOTE 11 (b) (i)

INVESTIGATE *DEGREE* OF THE INCAPACITY

10(3)

CONSIDER THE *CAUSE* OF THE INCAPACITY

10(3)

CONSIDERED WHETHER THE ILLNESS / INJURY WAS WORK RELATED / CAUSED

10(4)

Employer should ascertain the possibility

10(1)

“TO ACCOMMODATE THE EMPLOYEE'S DISABILITY

BY ALTERNATIVE EMPLOYMENT

BY ADAPTING DUTIES

BY ADAPTING WORK CIRCUMSTANCES

EE ACT & DISABILITY CODE

Reasonable Accommodation: CC

- Constitutional Court (“CC”)
- MEC for Education: KwaZulu-Natal, Cele, Martin and Knight v Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust

[71] it is “... *necessary to consider both the **content of the idea of reasonable accommodation...**”*

[74] “*Its importance is particularly well illustrated by the application of reasonable accommodation to **disability law.**”*

[74] “... requires that reasonable accommodation be made for people with disabilities. Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society.”

[74] “... it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them”.

77 “... taking reasonable steps to accommodate diversity is a factor for determining the fairness of discrimination. From this it is clear that reasonable accommodation will always be an important factor in the determination of the fairness of discrimination”.

Reasonable Accommodation: LAC

- Labour Appeal Court (“LAC”)
- Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality :

[8] *“In ... Employment Equity Law 2001: 7-3 to 7.4, J L Pretorius et al submit that the **duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act.**”*

[8] *“... the duty of reasonable accommodation ‘is a duty that is implied in the concept of unfair discrimination in a general sense’ ...”*

[8] *“... the duty of reasonable accommodation of employees ... ‘is one of the judicial and legislative tools for realising substantive equality’ ”.*

Reasonable Accommodation: LC

- Labour Court (“LC”)
- Standard Bank v CCMA, Myhill & Ferriera

[64] “Difference renders people with disabilities incapable of conforming to the norms of mainstream society. Living with a disability must be hard enough without having the additional burden of conforming to mainstream society. The least that mainstream society can do is to adapt to and embrace their difference to achieve substantive equality. After all, the essence of true equality is the accommodation of difference.”

Benefit Payment: Who / What / When

- Compensation Commissioner

 - insurer

 - medical scheme

 - State

 - employer

 - employee

Compensation Commissioner

- Compensation Commission responsible for payment of work-related admitted claims
- Covid-19 Infection must be found to have been work-related
- Neurological impairment must be found to be caused by Covid-19 (NB COIDA does not cover mental illness)
- Employer pays for cover for its employees
- Compensation Commissioner will pay:
 - Costs of medical care
 - Income benefit
 - Pension benefit
 - Dependent benefit

Insurer

- Employer is policyholder: employee potential beneficiary
- Employer may have purchased a PHI or DIB policy
- under a PHI policy where a claim for temporary disability is approved insurer will pay:
 - a sum which replaces the disabled employee's income
 - sum is typically 75% of the disabled employee's salary
 - not subject to income tax
- under a DIB policy where a claim for temporary disability is approved insurer will pay
 - a lump sum multiple of the employee's annual salary
 - typically 1x / 2x the employee's annual salary
 - not subject to income tax

Medical Scheme

- Privately operated non-profit (COIDA state operated)
- Voluntary employee benefit (COIDA is compulsory)
- Employee pays for medical scheme cover (COIDA employer pays for employee cover)
- Employer may subsidize all / % of membership cost
- Membership either under
 - group scheme policy
 - Individual policy

Medical Claims v COIDA Claims

- A medical scheme member who sustains an injury / disease on duty must notify their medical aid scheme.
- A medical scheme member must ensure their employer does in fact submit the IOD notification form to the Compensation Commissioner even if the medical scheme will cover the medical costs
- A medical scheme member must complete all the COIDA claim forms ASAP – COIDA should cover costs their medical scheme rules may exclude, and the ability to claim in any relevant year can become exhausted.
- A medical scheme member must check with the medical scheme which claims were paid and which were reimbursed by the Compensation Commissioner.
- A medical scheme member who pays for some of their own medical expenses may be able to be reimbursed for them, or if the medical scheme must be.

State

- A Medical Practitioner is not obliged to accept, deal with or wait for payment from Compensation Commissioner
- Depending on services availability to the patient, they may need to rely on a public health facility
- Public health facility care for treatment is typically not charged.

Employer

- COIDA pays without the need for the employee to prove fault COIDA benefits for
 - compensation of workers who become injured or ill in the course and scope of their employment
 - compensation for the dependents of workers who are killed in the course and scope of their employment
- If the employer has paid its premiums for COIDA (Workmen's Compensation) cover, where the employee sustains an injury / disease on duty (IOD) / work-related injury / disease, COIDA relieves the employer of responsibility for the medical costs / liability for the injury.
- As COIDA is an insurance scheme the Compensation Commissioner pays the medical costs of treatment and care.

Employee responsibilities in the Processes of Managing Disability / Incapacity

Scenarios 1: Employee Responsibilities

- When unable to work
 - Requesting Medical Certificates when ill
 - Submitting Medical Certificates in support of illness
 - Notifying employer to apply for disability benefit
- When receiving a disability-related benefit
 - Accede to insurer / fund instructions
 - Submit medical reports as required
 - Not frustrating the insurer's legitimate need to determine continued eligibility to be paid the benefit
 - No subverting purpose of benefit

Scenarios 2: Employee Responsibilities

- “Incapacity Inquiries” under employer procedures
 - Following the procedure
 - Co-operation
 - Participation
 - Submitting medical information
- When recovered
 - Active participation in return to work process
 - Following medical recommendations
 - Attempting ‘job-tryouts’ and alternative posts

How sick leave works with incapacity
(short term & long term)

How to Access Income when Ill: the Benefits and Sequence of Applications

- BECOA
 - Apply to employer for sick leave until available sick leave becomes exhausted
- Employer Conditions of Service
 - Apply for extended sick leave if this form of discretionary leave is available and is approved
- COIDA (IODs only)
 - After notification of IOD while unable to work employer must pay 1st three months salary, then Compensation Commissioner
- UIF (non-IODs)
 - Apply for UIF Sickness Benefit once all sick leave exhausted paid for specified number of months
- PHI (temporary disability) – employer application
 - Employer claims on behalf of disabled employee to insurer for payment of insured benefit for temporary disability

- CAPDIS (permanent disability) – employer application
 - Employer claims on behalf of disabled employee to insurer for payment of insured benefit for permanent disability
- Private disability benefit policy cover
 - Employee claims from disability / credit life insurer
- Ill-health Early Retirement (permanent disability)
 - Employee applies to retirement fund

What Employee Benefits / Benefits exist?

Who assesses and how?

BCOEA Sick Leave

UIF Illness Benefit

Employer Public Liability Insurance

COIDA Workman's Compensation

Insured Disability Income Replacement Benefit

Insured Lumpsum Benefit

LRA Bargaining Council Disability Benefit

LRA Bargaining Council Retirement due to Ill-health benefit

Private disability / dread disease cover

Private credit life insurance cover

PFA Retirement Fund Ill-health Early Retirement Benefit

PFA Retirement Fund Death Benefit

State Disability Grant

BCOEA Sick Leave

- S22 Basic Conditions of Employment Act (“BCOEA”)
 - “sick leave cycle” means the period of 36 months’ employment with the same employer
 - during the first six months of employment, an employee is entitled to one day’s paid sick leave for every 26 days worked
 - Does not apply to employees working less than 24 hours /month. They should negotiate sick leave
- How the sick leave is reckoned:
 - Employees on 5 a day week = 30 days every 36 months.
 - Employee on a 6 day week = 36 days’ every 36 months

UIF Illness Benefit

- Unemployment Insurance Fund (“UIF”)
- “Illness Benefit”
- Employee eligible if receiving less than normal wages while on sick leave
- Requirements of employee claimant:
 - must be a contributor to the UIF
 - must have been sick for more than 14 days
 - claim must be made within 6 months of the illness
 - claim must be on the UOF form which includes a medical certificate by doctor / homeopath.
- Benefits are payable up to 238 days maximum in any 4 year period, depending on credit employee has earned

Employer Public Liability Insurance

COIDA Workman's Compensation

- Compensation for Occupational Injuries & Diseases Act
 - COIDA a 'no-fault' insurance: employer paying premiums is relieved of responsibility and compensation liability
 - CC liability arises if Injury / disease determined by Compensation Commissioner ("CC") to have been incurred on duty ("IOD") or arising from employment
- COIDA does compensate IOD Covid-19 neurological injury IOD but compensation for any IOD Covid-19 mental disease is excluded – except PTSD (following litigation)
- After notifying IOD to CC, while employee unable to work employer must pay 1st three months salary, & claim from CC
- Medical Practitioner not obliged to accept a COIDA claim, or deal with CC or to wait for payment from CC

Insured Disability Income Replacement Benefit

- Insured benefit for temporary total disability
- Purpose to replace income while disabled
- Policyholder = employer, employee a beneficiary
- Typically pays 75% of salary until
 - rehabilitation and recovery
 - obligatory retirement in term of fund rules
 - death
- Policy qualifying criterion: temporary total inability to undertake duties of “*own occupation*”
- Will cover qualifying Covid-19 neurological injury (work-related or not) and qualifying Covid-19 mental disease

Insured Lumpsum Benefit

- Insured benefit for permanent total disability
- Purpose to provide a lumpsum if never able to work again
- Policyholder = employer, employee a beneficiary
- Typically pays a multiple of annual salary (1x – 2.5x)
- Typical policy qualifying criterion: total permanent inability to undertake duties of “*any occupation*”
- Will cover qualifying Covid-19 neurological injury (work-related or not) and qualifying Covid-19 mental disease

LRA Bargaining Council Disability Benefit

- Employers and employees in some industries negotiate employee benefits (and salaries & terms)
- Bargaining Councils oversee employee benefits for employee members of the Bargaining Council
- One employee benefit is a disability benefit
- Qualifying criterion may be
 - Permanent total disability for own / any occupation
 - Temporary total disability for own / any occupation
- Many employees unaware of its existence

LRA Bargaining Council Retirement due to ill-health benefit

- Employers and employees in some industries negotiate retirement funds (and salaries & terms)
- Bargaining Councils appoint trustees to manage retirement fund for employee members of fund
- One retirement fund benefit is early retirement on ground of ill-health or injury
- Qualifying criterion will be permanent total disability for any occupation
- Many employees unaware of its existence

Private disability / dread disease cover and Credit Life cover

- Many employees have private insurance policies
 - Disability (PHI or CAPDIS)
 - Dread disease
 - Mortgage Protection
- A Credit Life Insurance policy is
 - required when buying under a credit agreement
 - to enable payment to be made when temporarily ill / injured
- Many forget the policy / think it will not pay out
- Most policies
 - will cover cognitive deficits arising from neurological injury related to Covid-19
 - will exclude mental illnesses, howsoever caused
- Involve broker and claim as soon as possible

PFA Retirement Fund Ill-health Early Retirement

- Many employees are members of retirement funds
- Retirement funds provide three benefits for fund members
 - Retirement benefits
 - Death benefits
 - Disability benefits
- The retirement fund disability-related benefit is early retirement on ground of ill-health or injury
- Qualifying criterion will be permanent total disability for any occupation
- Many employees unaware of its existence

State Disability Grant

- Social Assistance Act 2004
- Disability grant only available to people aged 19 -59
- Criteria for applicant benefit eligibility:
 - medical / assessment report confirming permanent, severe disability.
 - medical assessment must not be older than 3 months at date of application.
 - applicant and spouse must meet the requirements of the means test.
 - not being maintained or cared for in a State Institution.
 - The applicant must not be in receipt of another social grant in respect of him or herself

State Care Dependency Grant

- Social Assistance Act 2004
- Grant covers disabled children from birth until 18
- Grant purpose is to fund the taking care of a child who:
 - has a severe disability
 - is in need of full-time and special care
- Criteria for benefit eligibility:
 - parent, primary caregiver or a foster parent appointed by court
 - South African citizen or permanent resident
 - not earn more than R223 200 a year if single / combined income should not above R446 400 a year if married (does not apply to foster parents)
- The child must:
 - be younger than 18 years
 - not be cared for permanently in a state institution
 - have a severe disability and be need full-time and special care.

Conclusion

Take Homes - Medical Practitioners & Patients with post-Covid-19 Mental illnesses / Neurological Impairments

- MP duty to protect patient benefit interests
- MP need to promote patient's labour law rights
 - As disabled employee under EEA
 - As incapacitated employee under LRA Disability Code
- MP need to understand processes of other fields
- MP need to do cross-disciplinary 'dot-joining'
- Need to know when / why / how to:
 - Initiate labour law disability / incapacity procedures
 - Initiate employee benefit notification / application steps
- Need to know "reasonable accommodation" right
 - when / why / how / by what means
 - Close co-operation with ORs and PTs and SWs

Take Homes – Labour Law and Mental Illnesses / Neurological Impairment / Disability

- Employment legislation and mental health
 - omits mental disability
 - no legislation: constitutional right to “psychological integrity”
- OHSA legislation establishes no mental illness duties
 - None in the legislation
 - None in the regulations (physical illness / injury only)
- COIDA does not compensate work-caused mental illness
 - Only PTSD
 - Not GAD / B-PMD / MD / Psychosis
- LRA Dismissal Code on ill-health
 - Deficient at publication in 1995
 - Un-amended for 29 years and no longer states the law

Any questions?

Thanks for Your Time and Attention

Peter Strasheim

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