

WHAT EMPLOYERS NEED TO KNOW DURING THE COVID-19 PANDEMIC

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MITIGATING THE EFFECTS OF COVID-19 PANDEMIC AT WORKPLACES

The employers in collaboration with their employees are expected to:-

- Ensure safety, health and welfare of employees at work.
- Implement safety and health policies.
- Assess the risk of exposure with respect to every work activity and put in place necessary mitigation measures.
- As guided by Public Health Department; develop Infection Control Plans, practice workplace hygiene and promote prompt reporting of suspected cases.
- Employers are encouraged to treat workers who may be infected or affected by Covid-19 in a humane manner and not to discriminate against them but provide them with the necessary support to enable them to recover and resume work.

The Statute Law (Miscellaneous Amendments) Act, 2019 introduced Section 93A of the Act, which particularly deals with the register of beneficial ownership of shares. The essence of S. 93A is to promote transparency in the ownership structures of companies in Kenya. By the enactment of statutory provisions, it is now a legal requirement to disclose full beneficial ownership of shares held in Kenyan companies. The failure to comply with S.93A is tantamount to an offence for which the company and each officer of the company in default are liable.

Requirements under Section 93A

- Every company (registered in Kenya) shall keep a register of beneficial owners of shares;
- A company shall enter in its register of beneficial owners, information relating to its beneficial owners as prescribed in the regulations;
- A company shall lodge with the Registrar a copy of its register of beneficial owners, within 30 days after completing its preparation; and
- A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within 14 days after making the amendment.

The Companies (Beneficial Ownership Information) Regulations, 2020 (the “Regulations”) were published on 18th February 2020, which fully operationalised Section 93A of the Companies Act 2015.

Highlights of the Companies (Beneficial Ownership Information) Regulations, 2020

The Regulations recognise beneficial ownership of shares (which was previously not recognised).

Supplementing the definition of a “Beneficial Owner”, the Regulations provide that a beneficial owner shall be a natural person who satisfies the following criteria:-

- holds at least 10% of the issued shares in the company either directly or indirectly;
- exercises at least 10% of the voting rights in the company either directly or indirectly;
- holds a right, directly or indirectly, to appoint or remove a director of the company; or
- exercises significant influence or control, directly or indirectly, over the company.

Application of the Regulations

If a company does have shares issued through a nominee structure and which structure the Regulations apply, then the company is now required to take reasonable steps to identify the beneficial owner of any shareholder (who falls within the stated criteria) and who is a nominee or trustee or a corporate shareholder.

The Regulations further prescribe the particulars which a company is required to enter in its register of beneficial owners, some of which are:-

- full name;
- birth certificate/ID/passport number, personal identification number (retaining copies of the same);
- establish nationality;
- full postal and physical address, business address, residential address, telephone number, email address;
- occupation/profession;
- nature of ownership or control and the date on which any person ceased to be a beneficial owner (as applicable).

Over and above, the Regulations, have a general provision that the company should be in a position to obtain “any other relevant detail the Companies Registrar may require from time to time.”

The Regulations provide for the procedure which a company should take where one of its officials (falling within the definition of a beneficial owner or a person whom the company has reasonable cause to believe is a beneficial owner of a company) fails to provide the particulars.

The Regulations exempt persons who have received notice of disclosure and who pursuant to such notice of disclosure, have obtained an order prohibiting disclosure from the High Court of Kenya.

Where a person fails to comply to provide information of beneficial ownership, a restriction on such person's relevant interest (i.e. shares held; voting rights; or the right to appoint or remove any member of the board of directors) in the company is required to be noted. The effect of a restriction issued under the Regulations is that:-

- any transfer of the interest is void;
- no rights are exercisable in respect of the interest;
- no shares may be issued in right of the interest or in pursuance of an offer made to the interest-holder; and
- no payment may be made of sums due from the company in respect of the interest.

To safeguard the interest of beneficial owners, the Regulations specify that a company shall not use or disclose any information about its beneficial owners, except:-

- for communicating with the beneficial owner concerned;
- in order to comply with any requirement of the Regulations; or
- in order to comply with a court order.

A further safeguard is that details of beneficial ownership shall not be made available to the public.

There is a general provision permitting disclosure, with written consent of the beneficial owner or shall only be made available to a competent authority (i.e. Attorney-General, any criminal investigation agency established by law, law enforcement agencies, authorities that supervise and monitor the financial sector, including the Financial Reporting Centre and the Kenya Revenue Authority) upon a written request by the competent authority to the Registrar.

It should be noted that although the Regulations have been published, neither the Act nor the Regulations prescribe a deadline for the preparation of the register of beneficial owners. The only obligation is to take steps to comply as the Regulations have taken effect.

In the absence of time lines, enforcement will remain an issue, since the information is required to be lodged with the Registrar of Companies "within 30 days", failing which the company and each officer will have committed an offence and be liable to pay the stipulated fines.

Should you have any queries or need any clarifications, please do not hesitate to contact Vikram C. Kanji at A.B. Patel & Patel Advocates, Mombasa.



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