



COVID-19 - QUESTIONS ON REDUCTION OF WORKFORCE AND BENEFITS IN INDIA

Indian businesses have been no exception to the pandemic induced economic crisis. While discussing about frustration of contracts, force majeure and data privacy issues, one of the key legal subjects discussed by many international and Indian companies currently is reduction of workforce and/or variation of terms of employment in India. Further, it appears that the several weeks of lockdown and work from home may have demonstrated (contrary to the pre-lockdown understanding) that a large team of employees is not necessary for all assignments, thereby giving rise to a new realization on productivity. Considering that experts and forecasts anticipate more adversities and economic turmoil in the coming days, it will be inevitable to ensure efficiency in workforce and reduce manpower related expenses where possible and also free up the obligatory or ornamental hires.

Post lockdown, the central and the state governments had issued advisories to the employers not to terminate the employees or reduce their wages during the lockdown period.

However, the concern arose when the Ministry of Home Affairs issued an order on 29 March 2020, mandating all the employers of all establishments to pay full wages to the workers during the lockdown period (“MHA Order”). The MHA Order appears to be applicable to all categories of junior and senior employees and the workmen under the Industrial Disputes Act, 1947 (“ID Act”). The “workmen” include any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or

supervisory work, and excludes persons employed in managerial or administrative capacity and drawing wages of more than INR10000.

The constitutionality and the validity of the MHA Order is currently subject to judicial interpretation, and until a final clarification is received from the government or the Supreme Court of India on the scope of the MHA Order, it is advisable that the employers comply with the MHA Order, and deem it applicable to all category of employees during the lockdown period.

If view of the foregoing, we have compiled certain FAQs based on the enquiries we had received from various clients, as follows:

LEAVE

- *Can an employer compel the employees to take leave during the current COVID-19 scenario?*

No, leave is a statutory entitlement of the employees. If the employee is available to work from home, the employer cannot compel the employee to take leave. Similarly, even in cases where the nature of work is such that it cannot be done from home, the employer cannot compel the employees to take leave. The minimum leave threshold under the ID Act, the state-specific Shops and Establishments Act (“Shops Act”), the Industrial Employment (Standing Orders) Act, 1946 (the “Standing Orders”) and the employment agreements must be provided by the employers to the employees of all categories.

- *Can the employer compel the employee to take leave of absence?*

No, under the Standing Orders, leave of absence can be sought only by the employees, when they have exhausted their paid leave. The employer cannot compel the employees to take leave of absence.

- *Can the employee voluntarily request to take paid leave / leave of absence?*

Yes, the employee can voluntarily request the employer to grant leave/leave of absence. However, caution must be taken that such arrangement is not coerced on the employee. Further, mass voluntary leave requests may be viewed as the employer's indirect attempt to deduct wages, which is prohibited by the government during the lockdown period.

- *If the employee is unable to work from home, can the employer compel the employee to take the un-availed paid or sick leave?*

No, if the establishment is closed under the government order, the employer cannot compel the employees to take the paid / sick leave, if they are unable to work from home.

- *If the employee is deliberately not attending to work from home and is not available on calls on certain day(s), can the employer treat that as the employee's leave?*

Yes, if the employee does not work from home and is unavailable on calls due to personal reasons, it can be treated as the employee's leave

- *If the employer reduces the employees' work days and work hours in a week, will the leave entitlement be reduced accordingly?*

Leave is a statutory entitlement provided to the employees based on their number of working days in the previous year. Therefore, the employer must provide the minimum leave threshold to the employees irrespective of the number of work days and hours in a week.

WAGES

- *Can the employer deduct the employees' wages/salaries during the lockdown?*

No, the government has prohibited the employers from deducting the wages/salaries of the employees during the lockdown period.

- *Is it mandatory for the employer to pay all the allowances to the employee during the lockdown period?*

There are no specific government guidelines in this regard. If the employer is paying the entire wages/salaries (last drawn) to the employees, the employer may deduct allowances for the employee's travel, food, etc., during the lockdown when the employee does not have to travel to work.

- *Can the employer and employee mutually agree to reduce the employee's salary / wages?*

Although the MHA Order prohibits reduction in salaries, practically, if an employee is agreeable to the reduced wages in the larger interest of the company, the employer and the employees can mutually agree to reduce the salaries. However, caution must be exercised and the arrangement must be adequately documented to substantiate that such arrangement is not challenged as coerced on the employees. Further, mass reduction of salaries may be viewed as the employer's indirect attempt to deduct wages, which is prohibited by the government during the lockdown period. For the workmen category, the salary cannot be reduced below the statutory threshold of minimum wage. Also, any change in the compensation will involve giving twenty-one (21) days' notice to the employees who qualify as workmen under the ID Act, unless there is a settlement in respect of these changes signed by all the employees, and a copy of such settlement is submitted to the Labour Department.

- *If an employee's salary is target based and the employee fails to achieve those targets,*

can the employer pay the reduced salary to such employees during the lockdown?

No, the employer cannot deduct the employees' salaries during the lockdown period, even if the employee has failed to achieve the targets.

- *What are the statutory requirements for reducing the wages or changing the terms of service of workmen?*

For the workmen category under the ID Act, the employer must provide a twenty-one (21) days' prior notice to change any conditions of service including wages. The number of days may vary state-wise. An alternate option is to get a settlement in respect of these changes signed by all the employees who qualify as workmen. Thereafter, a copy of such settlement must be submitted to the Labour Department to comply with the ID Act provisions.

TERMINATION

- *Can the employer terminate the employees who fall under the workmen category during the lockdown?*

No, the government has prohibited the employers from terminating the workmen during the lockdown. However, after the lockdown, the employer may terminate the workmen by giving them the statutory termination notice or salary in lieu of, and by providing a reasonable reason for termination. If the workmen are retrenched, a severance compensation as prescribed under the ID Act must also be provided. The notice period depends on the duration of the employees' services. The ID Act does not define the reasonable reasons for terminating the workmen. However, lay off due to redundancy, business closure, losses due to the Covid-19 lockdown, etc., may be regarded as reasonable reasons depending on the court's discretion and on case to case basis.

- *Can the employer terminate the managerial level employees during the lockdown?*

No. As discussed above, until the government or the Supreme Court clarifies the scope of the MHA Order, the employers must refrain from terminating any category of employees during the lockdown. After the lockdown, the employer may terminate the employees. The termination provisions under the ID Act, and some of the state specific Shops Acts are not applicable to the employees in the managerial capacity. Therefore, the termination of such exempted categories of employees will be governed under their employment agreements. In cases where the Shops Act does not exclude the managerial employees, termination notice as required under the Shops Act will have to be provided. Indian courts have ruled that certain categories, such as IT professionals and people with a mere designation of a manager, but not working in managerial roles fall under the category of workmen and the ID Act's termination provisions will be applicable to them.

- *Can an employer terminate part-time employees during the lockdown?*

No, the employer cannot terminate the part-time employees during the lockdown.

- *Can the employer terminate those employees who were already due for termination for poor performance, misconduct, or otherwise during the lockdown?*

No, as per MHA Order, the employers cannot terminate any employee during the lockdown. Further, in the current scenario of the pandemic, it is likely that even the otherwise due and genuine terminations are seen in the bad light and challenged by the employees. Post lockdown, if the employers terminate the employees otherwise due for termination, the employer must pay the outgoing employees' statutory severance compensation, statutory benefits due to be paid, execute release agreements, and keep the paperwork as robust as possible with respect to the outgoing employees to substantiate the reasons for termination.

- *Can the employee voluntarily resign during the lockdown?*

Yes, legally, the employee can resign at any time, including during the lockdown. However, the resignation letter and other documents must be carefully prepared to ensure that the employee does not later challenge the resignation as coercive. The labour departments and the courts may have more sympathetic approach towards the employees and can view the resignations also as coercive in the absence of any bargaining power. In such a scenario, the employers must ensure adequate documentation to demonstrate that the employee's resignation was voluntary.

- *Can the employee's consistent unavailability and not attending to work while working from home be regarded as absenteeism, indiscipline and insubordination, and a ground for termination for misconduct?*

Yes, if the employee is deliberately and consistently unavailable and does not attend to work while working from home despite warnings from the employer, the employee's conduct may be regarded as absenteeism and indiscipline. In such scenario, the employer may initiate misconduct inquiry against such employees, and take disciplinary action accordingly.

STATUTORY BENEFITS

- *Can the employer avoid paying bonuses to the employees in the current COVID-19 scenario?*

The statutory bonuses payable under the Payment of Bonus Act, 1965 ("Bonus Act") must be paid by the employer to the eligible employees within the maximum period prescribed under the statute. However, as regards the incentive bonuses to the senior level employees or those employees not covered under the Bonus Act, the employers may pay the bonuses according to the terms of employment in their employment agreements.

- *Can the employer defer the statutory bonus payments?*

The statutory bonus payments may be deferred, if permitted by the government upon an application filed by the employer citing adequate reason for deferring the bonus payments.

- *Can the employer defer the statutory contributions towards the provident fund?*

Yes, the government has extended the deadline for remitting the contributions.

- *Can the employer defer the statutory contribution towards the employee insurance under the Employees' State Insurance Act, 1948?*

Yes, the government has extended the deadline for remitting the contributions.

DATA PRIVACY

- *Can the employer ask employees if they have COVID-19 or symptoms of COVID-19?*

Yes. Technically, the current Indian data privacy law mandates prior consent for collecting and processing data subject's sensitive personal information, such as health data, and the employees' consent will be required to collect such information. However, COVID-19 is a peculiar and unprecedented situation and the employers have the obligation to implement adequate security measures to ensure health and safety of its employees from COVID-19. Also, although the right of privacy is a fundamental right under Indian Constitution, it is not absolute and is subject to reasonable restrictions. Thus, the employees cannot have privacy concerns in disclosing their COVID-19 related symptoms at their workplaces. Further, the government has provided mandatory standard operating procedures for workspaces and the penalties for contravention. In view of the foregoing, the employers may ask the employees if they have COVID-19 related symptoms, without requiring employees' prior consent.

- *Can the employer measure the body temperature of employees for possible COVID-19?*

Yes. The employers do not require the employees' consent for checking body temperature, because it is part of the employers' security measures. The government has mandated the companies to carry out thermal screening for all the employees and visitors. The employer can refuse entry into office if an employee does not allow to measure body temperature.

- *Can the employer disclose to employees if a colleague or visitor has or may have contracted COVID-19?*

Yes, although there is no specific obligation on the employer, the employer can disclose the information irrespective of consent, based on the employer's general responsibility and safety measures to protect other employees from the virus.

- *Can the employers inform public authorities, if an employee tests positive for COVID-19?*

Yes, although there is no specific obligation on the employers, the employers can inform the public authorities.

PENALTIES

- *What are the penalties for non-compliance of the MHA Order?*

If any person refuses to comply with the government's directions under the Disaster Management Act, 2005, he/she shall be punishable with imprisonment up to one (1) year and / or fine. Disobedience of any public servant's order resulting in obstruction or injury to a lawfully employed person will result in imprisonment up to one (1) month and / or fine. Where the offence has been committed by a company, every person in charge or responsible for conduct of the company's business at the time of committing the offence will be considered as guilty and liable for punishment.

CONCLUSION

To conclude, the employers may refrain from terminating or changing the employees' terms of employment during the lockdown period.

However, the employers who are constrained to reduce the workforce may offer voluntary resignation options and negotiate the terms with the employees, pay their statutory benefits, and other outstanding compensation and remuneration, and also prepare adequate documentation with reasons to record the employees' resignation.

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