

HOW COVID-19 AFFECTS YOUR EMPLOYMENT

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The Covid-19 outbreak has been causing a great economic standstill affecting both public and private enterprises. To deal with the losses, many companies are resorting to wage cuts, lay-offs and termination as mitigating factors for losses during the ongoing crisis. This raises a few questions in the employee's mind that are now to be addressed.

WHAT MEASURES HAS THE GOVERNMENT TAKEN?

As per the advisory dated 20th March 2020 by the Labor Ministry, all public and private enterprises were instructed to continue the payment of wages of their employees and not to reduce their wages during this time. The Ministry also requested the employers to not terminate or lay off their employees and that all employees on leave during this period will be treated as “on-duty” employees without any wage reduction.

On 29th March 2020, the Ministry of Home Affairs issued an order under Section 10(2)(1) of the Disaster Management Act, 2005 (“DM

Act”) directing the state Governments to take necessary action in ensuring every employee has been made a payment of their wages without any deduction, on the due date. What must be noted that under Section 72 of the DM Act, any “order” passed by the State shall override or prevail over any other law at the time. Now, since the letter issued on 20th March was an advisory and not an order, it does not hold a binding nature.

The “wage order” was widely opposed by many employers, who filed writs in the Supreme Court contesting that the order mandating payment of full wages to all employees during the lockdown was unconstitutional and coercive in nature as it violated the rights of the employers under Article 19(1)(g) of the Indian Constitution, which talks about the freedom to carry on any occupation or business. The said order violated this fundamental right of the employers as it may have restricted their autonomy and made restrictions over their right of conducting business adequately. This in turn would lead to massive shut down of

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several industrial units if they are forced to pay wages even when there is no income for the company itself. It was argued that the wage order is *ultra vires* as it restricts the employers and businesses to run at their free will.

The Supreme Court did not pass any final order on these petitions but a three judge bench led by L. Nageswara Rao, J., observed that the said order was omnibus and many small and private enterprises may not be able to survive since compulsion of full wages would cause severe losses during a time of no income; and that the government cannot take any coercive action against the employers.

On 17th May 2020, the wage order issued on 29th March was revoked by the government. This revocation follows that employers are no more compulsorily required to pay their employees full wages during the period of lockdown. This step by the government was criticized by many arguing that the principle of “no work no wages” cannot be applied during a time of a global pandemic and that the employers must necessarily pay employees, who are not able to work due to a force-majeure event- something they have no control over.

THE LEGALITY OF WAGE CUTS.

The Industrial Disputes Act, 1947 (“ID Act”) defines wages under Section 2(gg)(rr). Wages comprise of all sort of remuneration that

holds a monetary nature, which would be payable to a workman if his terms of employment are complied with and the work so allotted to him is complete.

Wage cuts are a common remedial solution adopted by employers as it is one of the biggest expenditures for any company. Wage cuts are often preferred over retrenchment and lay-offs by both parties, since the employers avoid losing human capital and paying retrenchment and lay-offs compensation, while for the employees, they still have job security, and a salary influx.

Although the advisory dated 20th March suggested that the employers shall avoid relying on wage cuts as a measure to mitigate losses, Sectors such as the Automobile and Aviation industries in India have been severely affected by the Covid-19 outbreak and hence are forced to rely on salary cuts.

The prominent question that was asked after the “wage order” of MHA was whether this order is binding in nature or not.

An argument was made that a mere reading of the provisions of the Disaster Management Act, would suggest that powers have not been vested with the Government to direct private employers to pay wages during a disaster when the employees are not working, which hampers their prerogative of business decisions. The scope of the Act only

talks about forming committees which frames plans to meet disasters.

However, despite the fact that the DM Act does not specifically vest or confer any power to the Government (Central or the State) to direct the private employers to pay wages/not deduct wage, various other provisions of the Act do empower the Government to pass orders that are compulsory to be complied with, which includes the order talking about wage cuts.

The order passed was made in pursuance to Section 35(l) and 38(l) of the DM Act. These provisions state that the Government can take necessary measures to secure effective implementation of the DM Act. Further, Section 72 of the Act is a non-obstante clause which gives overriding powers to the Government at the time of a disaster like the Covid-19 outbreak. It states, "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act". Hence, section 25M of the Industrial Disputes Act, 1947 which empowers an employer to pay only 50% of the wages to a worker during a calamity was nullified at the time this order was enforced.

An argument was also made that the payment of wages to the workers in a way ensures that these workers can afford various healthcare

and safety requirements, especially at times like the Covid-19 outbreak, and hence these could be held as a measure to prevent the spread of the Coronavirus. The question posed by many private employers is that their prerogative to make business decisions cannot be hampered by an order. In furtherance of this, there also lays an argument that The Epidemic Diseases Act, 1897, which has been used by the states to pass orders during the Covid-19 outbreak only enables the government to prescribe measures to prevent the outbreak and spread of a disease and does not give the States the power to direct any private company.

It may also be taken into consideration that the onset of the "Lockdown 4.0" brought about radical changes in the lockdown restrictions, and the State Governments were given the power to reopen several establishments in order to maintain equilibrium of the economy and recover the losses. This raises the concern that even in establishments that are now allowed to reopen and function normally, the previous order from the MHA dated 29th March would still instruct employers to pay full wages to their employees despite their voluntary absence. This in turn would cause employees to misuse the provisions of the Order, since they will be paid their full salary even after not showing up for work.

In order to address such issues and discrepancies apart from the various writ petitions filed against the Government, the Order of the MHA regarding wage cuts was withdrawn.

THE LEGALITY OF LAY-OFFS.

Lay-offs have been defined under Section 2 (kkk) of the Industrial Disputes Act, 1947. The measure taken by employers when they are unable to pay their employees or provide for employment for a period of time due to losses falls under the ambit of Layoffs. They can be of temporary and permanent nature, although the scope of ID Act as well in practice in India only provides for temporary lay-offs, and the term is not to be used synonymously with “Retrenchment”.

As we already know the wage order of 29th March did not specifically include lay-offs, so its revocation does not hold any implications for Lay-offs in particular. Although the advisory issued by the Home Ministry on 20th March may include lay-offs apart from other retrenchments and wage cut activities. Such advisories passed by the Government are also said to have an enforceable nature to them. The Chief Labour Commissioner’s office is making sure that such advisories by the Home Ministry are adhered with, as was seen when the Spicejet CMD was asked to rescind the policy of “Leave without pay” that was passed by the airline, and follow the Government advisory during the Covid-19

outbreak. This indeed does show that Lay-offs do have repercussions but what must be taken into consideration is the fact that if there does lie any other suitable alternative? For instance, the hotel industry is said to be losing Billions of dollars in revenue every week, and the Hyatt Hotels Corp has decided to lay off around 1300 of their employees as a last resort. Companies such as OYO and UBER, who directly cater to the general public of India are amongst the worst hit and will be resorting to lay-offs as that is the only viable option for them.

Chapter VA of the Industrial Dispute Act states that lay-offs are not applicable for establishment with less than 50 workers. While for the establishments that can legally lay off their employees, a right for compensation is provided for all the workmen who have their names on the muster roll. The compensation must be 50% of the total basic wages that the worker must have earned had he not been laid off.

As far as the legal viability of lay-offs during the Covid-19 outbreak is concerned, the ID Act does mention that employers can lay-off their employees at times of natural disasters. Further, there are provisions in the act which mandate the employer to compensate the employee so laid off. Although another debate that does arise out of this is whether all employees can be legally laid off or only the defined “workman” under the Industrial

dispute Act. The statute and further judgments on the same have provided that the definition of a “workman” falls under any person who does manual, unskilled, skilled, technical, operational, clerical or supervisory work.

LEGALITY OF RETRENCHMENT

The Industrial Disputes Act, 1947 Section 2(oo) defines “Retrenchment” as termination of a workman by the employer of a service for reasons other than a disciplinary action and punishment along with necessary compensation of 15 days average pay for continuous service per year. This practice is generally looked down upon during natural calamities and pandemics, although at times of severe economic hardships, retrenchments are the only viable solution for downsizing.

Since the letter dated 20th March 2020 advising the employers to not terminate their employees does not have a binding nature, retrenchment is an option available to the employers and can be taken as a last resort. The Supreme Court on the question of retrenchment has observed that the employer holds the right to terminate their employees in case of a surplus unless barred by law.

Although all necessary processes such as notice period, intimation to government authorities, compensation of retrenchment to employees, gratuity payment e.t.c must be followed.

The order issued on 29th March 2020 was greatly opposed by many, who argued that there exists many Micro, Small and Medium Enterprises (MSMEs) who might not be able to pay full wages to their employees during the lockdown due to the lack of operation, and thereby driving them to a complete closure of the business which would lead to an inevitable termination of employees. It was argued that the said order should be quashed as the government has passed the order in ignorance of the MSMEs and other establishments whom they are required to support especially during these trying times. The said order would drive the employers to forcefully close down their business leading to mass termination and unemployment.

The revocation of this order on 17th May 2020 by the government provides some relief to all industries, who can now avoid losses leading to their eventual close down, which further avoids termination to a certain extent.

WHAT STEPS ARE THE COUNTRIES TAKING?

Denmark and England are said to cover 75 % and 80% of wage bills respectively while Canada, Australia, Ireland and Malaysia have come up with various wage subsidies.

In order to avoid lay-offs, Denmark is paying 75% of the entire salary of employees of a company for 3 months while Norway is giving partial to full wage compensation for

those laid off. In Argentina, employers are barred from firing any worker for 60 days after which a minimum percentage of salary needs to be paid while Spain has put an outright ban on termination along with allowance for temporary workers.

While in India, states like Uttar Pradesh has suspended all labor laws barring three making it easier for employers to hire and fire employees, in determining the wages of

the employees and helping the employers in reducing their liability and Madhya Pradesh made certain amendments to the labor laws encouraging the setting up of new industries while also doing away with the requirement of taking the government's permission to suspend the employees. However, the need to seek permission from the government for terminating the employees continues to be a requirement.