



COVID-19 Pandemic: What to (or not to) do

A QUICK GUIDE FOR DECISION MAKERS

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Introduction

Following the outbreak of COVID-19 pandemic, the role of directors and senior management in taking appropriate measures, addressing concerns of various stakeholders and ensuring business continuity has become more important than ever. Directors and senior management should not only be cognizant of their duties and responsibilities during these turbulent times but also be mindful of the immediate and long term repercussions of their decisions on their respective businesses.

In the background of myriad governmental orders, guidelines and notifications being issued by regulators as the situation evolves, this guide briefly sets out the key corporate governance actions and certain other steps that are advisable to be taken by the decision makers during the ongoing lockdown and any period thereafter until the economic climate stabilizes.

Additional Responsibilities Imposed During the Lockdown

Typically, the directors of a company are under a statutory obligation to discharge their fiduciary duties and fulfil responsibilities as prescribed under the articles of association of the company, the Companies Act, 2013 (“**Companies Act**”), and under other relevant areas of law such as employment, data protection, regulations issued by securities market regulator (for listed entities) and so on. In addition to the foregoing, while the lockdown is in force, companies operating in India are also subject to the Disaster Management Act, 2005 (“**DM Act**”).

Failure to comply with directions issued pursuant to the DM Act is an offence punishable with penalty and/or imprisonment for every person (including any director or officer) who is in charge of the affairs of the company at the time of such commission/ omission. In the event a company is charged with an offence under DM Act, any director, manager, secretary or officer in charge of the company at such time will have to prove (i) that such person was not negligent in the performance of such action(s), and (ii) they did not consent to or condone the commission of such action(s), which resulted in the said offence.

Accordingly, it is in the best interests of the decisions makers to ensure that all corporate actions taken while the lockdown is in force follow the letter and spirit of various directions and related notifications (“**Pandemic Related Notifications**”) issued by the Central government, various state government and relevant regulators (the “**Governmental Authorities**”) in relation to the pandemic.

Responding to the Pandemic

Corporate Governance and Compliance with the Pandemic Related Notifications

While some of the changes that have been introduced pursuant to the Pandemic Related Notifications are temporary and may recede as the situation stabilizes, decision makers need to be cognizant that the pandemic has ushered a swift and systemic change in the manner in which businesses operate and interests of various stakeholders are protected and preserved. Set out below is a summary of certain key considerations in view of the Pandemic Related Notifications:

COVID-19 Guidelines

In the background of guidelines issued by the Ministry of Home Affairs, Government of India (“**MHA**”) through its order dated March 24, 2020, the Ministry of Corporate Affairs (“**MCA**”) has also issued a set of guidelines to provide guidance to the corporate entities operating in India to respond to the pandemic. Central to the measures required to be implemented by companies, was a directive to discourage employees and workers from travelling to and congregating at the workplace in large numbers. Therefore, the MCA had directed all companies operating in India to implement a ‘work from home’ policy and staggered working hours for their employees. In fact, in order to bring transparency in the enforcement of COVID-19 related guidelines, the MCA introduced the ‘Company Affirmation of Readiness towards COVID-19 Form’ (the “**CAR 2020 Form**”) which was a voluntary one-time form filing, effective from March 23, 2020 that required all bodies corporate operating in India to confirm compliance with the MCA’s COVID-19 guidelines.

While the web-service for filing CAR-2020 Form has been discontinued w.e.f. April 14, 2020, it yet to be seen if the MCA will reintroduce this filing with modified compliance, form and reporting requirements by the Indian corporate entities. Compliance with tools such as CAR 2020 Form may become a confidence-building tool for employees and investors, and may bring reputational benefit to companies in the long run.

Meetings of the board and shareholders

The board of directors may consider meeting virtually and frequently in order to maintain a dynamic response to the situation. Some of the key takeaways from the Pandemic Related Notifications in relation to holding the corporate meetings are set out below:

1. The board of directors should be prepared to defer decision-making on matters which require the approval of the shareholders under the articles of association of the company or the Companies Act, 2013 (“**Companies Act**”) since a physical meeting may be ill-advised. Through a circular dated April 08, 2020, the MCA has issued guidelines on the procedure to be followed while organizing shareholders’ meetings through e-voting/postal ballot under unavoidable circumstances. As a logistical matter, directors must ensure that companies have the necessary infrastructure required to conduct e-meetings and for safekeeping of electronic records.
2. The MCA and the Securities and Exchange Board of India (“**SEBI**”) have allowed various relaxations under the relevant Pandemic Related Notifications in relation to holding meetings of the board and shareholders. For instance, ordinarily, while certain matters can only be approved during physical meeting of the board; the MCA has relaxed the rules in this regard until June 30, 2020 to allow the board to discuss any and all matters *via* video conferencing and the maximum permissible interval between two board meetings has been extended from 120 days to 180 days for the current and next financial quarter. Due to the prevailing restrictions on international travel, the minimum residency requirement of 182 days required to be satisfied by directors pursuant to Section 149 of the Companies Act has also been waived for the financial year ended 2020. The SEBI has also extended the timeline for the listed entities for holding AGMs by one month and for holding the meetings of the nomination and remuneration committee, stakeholders’ relationship committee, and risk management committee by three months.
3. While the procedural requirements relating to holding both board and shareholders meeting have been relaxed, there has been a concomitant increase in the record keeping requirement and the minutes and transcripts are required to be stringently maintained. In relation to the shareholders’ meeting, public companies are also required to publish such minutes and transcripts on the company’s website (where such website exists).

4. It should be noted that quorum requirements at board meetings and shareholders' meetings of the company will not be diluted due to the lockdown.
5. The requirement for independent directors to hold at least one meeting without the attendance of non-Independent directors and members of management has been waived for financial year ended 2020.

Employment Matters

Given the impact of COVID-19 on the mobility of resources including human resources, directors and senior management may need to consider certain inevitable measures in respect of restructuring employee related costs. In light of the pandemic, the MHA, in an order dated March 29, 2020 (the “**March 29 Order**”), has directed that employers pay full wages to their workers without any deductions during the period of lockdown. The March 29 Order applies in tandem with labor welfare legislations such as the Industrial Disputes Act, 1947 which include protective provisions in respect of the employment and emoluments of workmen.

In furtherance of the March 29 Order, the government of Maharashtra has issued orders stating that all workers under the lockdown in Maharashtra are presumed to be on duty and employers are not permitted to make any deductions in their wages. Similarly, other state governments such as the governments of Haryana, Uttar Pradesh and Telangana have declared paid holidays to all categories of workers/employees. Accordingly, any exercise pertaining to employee cost rationalization should be implemented within the broad contours of the Pandemic Related Notifications.

It is critical to note that even though the March 29 Order makes reference to “workers” and “wages” and not “employees” *per se*, there may be a tangible risk that any unilateral communication or decision on reduction of salaries of any category of employees during the lockdown may amount to a violation of the March 29 Order.

Considering that the Indian jurisprudence has always favored the labor welfare over corporate inconvenience, adequate legal advice should be taken to ensure that no proposed restructuring exercise results in a breach of contract of employment or in a violation of the guidelines and orders issued by the Governmental Authorities, including the March 29 Order.

Compliance with Guidelines for Business Operations

The guidelines issued by MHA through its order dated March 24, 2020, (as modified and supplemented by various subsequent orders) have been further consolidated and supplemented by the MHA order dated April 15, 2020 (the “**Lockdown Extension Order**”). While the Lockdown Extension Order indicates that industrial activity in India will, subject to fulfilment of certain conditions, likely be restarted in a phased manner from April 20, 2020, companies should be conscious of the changes required to be implemented in their day to day operations. Even though these measure will become applicable to limited categories of business from April 20, 2020, decision makers should critically analyze the following specific guidelines prescribed in the Lockdown Extension Order even when re-evaluating their standard operating procedures in the post lockdown environment:

1. So long as the pandemic is active, workplaces which are operational are required to, *inter alia*, (i) enable themselves with infrastructure that is necessary to monitor health vitals of their employees and essential visitors (including thermal temperature screening), (ii) implement work from home policy for employees belonging to sensitive / at-risk health groups (such as those above the age of 65 years, with compromised immunity or parents with children under the age of five years) for a longer term, and (iii) discourage large meetings/gathering.
2. Significant weightage has been placed on practicing social distancing within workplaces. For instance, staggered lunch hours and splitting the operations into a shift-based system with no overlap have been recommended. Furthermore, even pre-dominantly white-collar intensive industries such as information technology and information technology enabled services have been allowed to resume operations at only 50% capacity to reduce the density of employees coming into the workplace.
3. Manufacturing units which recommence operations may need to modify their operating hours and reconfigure shop floors to meet adequate social distancing requirements. Measures relating to relocation/stay of workmen within the premises / in the vicinity of the manufacturing unit have been mandated. Where employers are not able to fulfil such requirements, they will be required to arrange for a social distancing compliant mode of transportation of employees to and from the manufacturing unit, as public transportation remains suspended.
4. Employers are required to mandatorily obtain medical insurance for their workers.

5. Adequate measures for providing hand-wash and sanitizers with touch-free mechanism at entrance and other convenient places, sanitization of office premises at regular intervals, ban on non-essential visitors, should be included in the business administration policies.

In the light of foregoing regulatory guidance, decision makers should carefully weigh the capital costs against the benefits of continuing operations while the Lockdown Extension Order is in force and the period thereafter. Going forward, some of these measures may become necessary for business operating in India until the country is declared free from the risks presented by COVID-19 pandemic.

Other Critical Measures

Keeping track of Pandemic Related Notifications

In order to ensure cohesive decision-making, directors should keep themselves informed about the company's affairs, including its day-to-day financial positions, as well as the measures being taken by the Governmental Authorities, especially any local authorities in areas where the company has operations. Due to the likelihood of increase in the regulatory scrutiny, it is critical to maintain compliance with Pandemic Related Notifications while the lockdown is in force as the regulators may not be open to condone any non-compliance. Directors and senior management should follow/subscribe to the forums that regularly provide updates regarding Pandemic Related Notifications for e.g. Invest India Business Immunity Platform has been introduced for investors and the business community to access all relevant information on COVID-19, including the latest information and government announcements.

Business Continuity Planning

Indian companies operating under the purview of the regulators such as SEBI, the Reserve Bank of India, etc., are necessarily required to maintain a business continuity plan. However, it is now advisable for all businesses to formulate such plans to allow their operations to continue and prevent knee-jerk reactions. Businesses should assess their preparedness to battle the pandemic (or other similar exigencies) whenever they are presented in each jurisdiction in which such businesses operates.

A robust business continuity plan should ideally include matters such as identification of alternative supply sources, work-from-home policy for employees (including directors and key managerial personnel), data security, establishing procedures to ensure uninterrupted invoicing and revenue collections, and retention policy with respect to surplus cash to take care of overheads which continue to accrue in a period of reduced productivity, and consequently lower cash inflow.

Evaluation of Business Insurance Requirements

Companies should re-evaluate their business insurance policies to determine coverage, if any, for the impact of the pandemic on their business. Impact of any existing exclusions in the form of *force majeure* clauses should be analyzed with help of experts. Due to the lessons being learnt in current economic climate, it may be advisable to procure insurance policies that, albeit at additional premium costs, covers the impact of pandemic related events on the business.

Conclusion

The impact of this pandemic and the concurrent changes in the regulatory regime will certainly outlast the ongoing lockdown. Even though the quantum of economic damage and the true extent of paradigm shift in the manner of undertaking business operations as a result of this pandemic is yet to be determined, it is a critical need of the hour that decision makers in every organization fully understand the challenges of the present situation, adapt quickly, keep themselves abreast of the changing legal regimes and social conventions and their implications on the business and respond in a dynamic manner that is best suited to the requirements of such organization and its employees.

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The Firm

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