

## COVID-19 and the Workplace: An Employer's Perspective

In a significant move, the Government of India implemented a nationwide lockdown in India in a bid to contain the COVID-19 pandemic with effect from March 25, 2020. The lockdown was initially expected to last until April 14, 2020 but has been extended until May 3, 2020. During the lockdown period, all private and commercial establishments are required to be closed down, with certain exceptions. While several employers have been providing work from home facilities to their employees during the lockdown period, due to the uncertainty over the scope of the COVID-19 public health emergency and the impact on the economy, employers are now considering options for saving labour costs for business viability reasons, including by reducing salaries of employees and/or terminating their employment. We discuss these options below.

### REDUCTION OF SALARY

The Ministry of Home Affairs has issued an order dated March 29, 2020 (the "**Order**"), among other things, directing all public and private establishments to make payment of wages to their workers without any deduction for the duration of the lockdown. Any violation of the measures stipulated in the order (including the direction above) would be punishable under the Disaster Management Act, 2005 with imprisonment of up to one year and/or fine. Various State governments such as Maharashtra, Delhi, Telangana and Uttar Pradesh have issued similar advisories/orders to public and private establishments.

In view of the Order, employers should refrain from reducing wages of its workers during the lockdown period. While the Order makes reference to "workers" and "wages" and not "employees", it is currently not clear if the intention was to apply it to all categories of employees. Under the Industrial Disputes Act, 1947 ("**IDA**"), a "workman" generally includes all types of employees other than employees mainly

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engaged in a managerial or administrative capacity or in a supervisory capacity earning wages more than Rs.10,000 per month. Accordingly, to the extent any employer considers reducing salaries of employees that are not considered as “workmen” under the IDA, employers should consider seeking a voluntary consent from the relevant employees – this would mitigate any risk of such employees claiming a violation of the Order.

Once the lockdown has ended, employers could consider implementing a reduction in the salary of its employees in compliance with the IDA (in case of “workmen”) and any state-specific laws. The IDA requires the employer to provide a prior written notice to the relevant workmen before changing any conditions of work (which includes wages).

Employers could also consider reduction of any variable pay, for example, the bonus, discretionary or incentive pay of its employees as a cost saving measure.

Any action to reduce the salary, including any variable pay, should be in compliance with existing company policies and employment agreements/offer letters issued to the employees and any collective bargaining agreements with trade unions. Employers should carefully review any communication to the employees in this regard in the context of any promises for future compensation. Further, if the reductions are taken as to only some, but not all employees, employers should ensure that it does not lead to any discrimination claims. Accordingly, decisions as to which employees will be impacted (and to what extent) should ideally be supported by legitimate business reasons.

## **TERMINATION OF EMPLOYMENT**

Employers who face severe declines in business due to the impacts of COVID-19 and the lockdown, a permanent termination of employment of its employees or in certain cases, closure of the business, may be inevitable.

The Ministry of Labour, Government of India has issued an advisory dated March 20, 2020 (the “**Advisory**”) pursuant to which employers of all public and private establishments were advised not to terminate the employment of any employees (particularly casual or contractual workers). Further, the advisory states that where any place of employment is rendered non-operational due to COVID-19, the employees of such unit shall be deemed to be on duty. It is unclear whether the failure to comply with this advisory will result in any punitive action being taken against the employer.

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Additionally, the Prime Minister of India in his speech on April 14, 2020 has requested employers not to terminate the employment of employees during the lockdown.

Employees may be terminated in accordance with the employment agreement/company policies or employee handbook. However, termination of employment of “workmen” in an industrial establishment or closure of certain categories of industrial establishments would require compliance with the IDA. Under the IDA, employers are required to provide to the concerned workmen notice of one month or wages in lieu thereof and compensation of 15 days’ wages for every year of continuous service) in case of termination of employment or closure of an industrial undertaking. The notice period could extend to 60 days in case of industrial establishments with over 50 workmen.

The IDA specifies that if the closure of an industrial establishment is on account of unavoidable circumstances beyond the control of the employer, the compensation payable to a workman shall be capped at the average pay for three months. However, closure on account of financial difficulties (including financial losses) is not considered to be on account of unavoidable circumstances beyond the control of the employer.

Further, employers should ensure compliance with any requirements under the State-specific shops and establishments acts.

## **LEAVE OF ABSENCE**

While employers could request employees to take accrued but unused leave and/or unpaid leave or a sabbatical for the duration of the lockdown, the employees will be entitled to reject such request. Employees may, however, voluntarily consent to taking unused leave and/or unpaid leave.

The Advisory specifies that any employee of an establishment which is closed during the lockdown is deemed to be on duty. Accordingly, any request for unpaid leave should be voluntary and should be well documented in order to mitigate any claims for non-compliance with the Advisory.

We understand that Nagreek Exports Limited, a company engaged in the manufacture and export of cotton yarns, fabrics and textiles, has challenged the Order pursuant to a writ petition filed in the Supreme Court of India on the grounds that the Order violates Articles 14 and 19 of the Constitution of India, in addition to being “illegal, unethical, improper and illegitimate” and that the Ministry of Home

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Affairs is not authorized to issue such directions to private establishments under the Disaster Management Act, 2005. The Supreme Court is yet to hear the matter.

Employers may ultimately consider a combination of the above measures depending on their business imperatives. However, prior to implementing any such measures, employers should check applicable central and State laws, take into account the impact of any new and developing COVID-19-related directives and regulations issued by the Central or State Governments, and consult with counsel.

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