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COVID-19 – Additional Employment Issues arising from Nationwide Lockdown

29 March 2020

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With the confirmed COVID-19 cases and death toll on the rise, the Ministry of Home Affairs (MHA) ordered a 21-day nationwide lockdown from 25 March 2020 to 14 April 2020. In the order, the MHA has issued guidelines, which the State governments are expected to implement strictly. The MHA guidelines inter alia require 'commercial and private establishments' to be closed during the lockdown.

Due to the lockdown, the economy has been brought to an almost complete halt, and domestic and international movement has been heavily restricted. Amidst this disruption, corporates are having to deal with significant issues relating to business continuity and compliance, employees are concerned about job security, and there are increased concerns over privacy and mass surveillance.

We had released a newsletter (on 17 March 2020) covering [employment issues related to COVID-19](#), and recently also came out with updates on

the [relaxations provided by SEBI](#), the [measures announced by the Finance Minister to address business disruptions](#), and the [extension on limitation period granted by the Supreme Court for filings in all courts/tribunals](#).

In this update, we focus on key issues related to employment law which have gathered greater significance since 17 March 2020.

The nationwide lockdown in India is having far-reaching effects for companies across sectors. As an update to our last week's newsletter, we have addressed some additional common issues that companies are currently facing while managing business continuity and employees.

1 Frequently Asked Questions – Employment

What kind of businesses can be kept operational during the lockdown?	
The MHA guidelines provide limited exemptions (including –	rom closure) to industries and service providers,
▪ Telecommunications, internet services, broadcasting and cable services	Power generation, distribution and transmission units and services

- IT and IT-enabled services (ITES) (for essential services)
- Data and call centre for government activities
- E-commerce delivery of essential goods, including food, pharmaceuticals, etc.
- Banks and private security services
- Cold storage and warehousing facilities
- Manufacturing units of essential commodities
- Production units, which require continuous service, after obtaining State government approval.
- Hospitality services accommodating tourists/persons stranded due to the lockdown, medical staff, etc.
- Print and electronic media

Establishments not covered under the various exceptions are directed to work only from home (WFH) (or where that is not possible, be closed down).

Since 25 March 2020, various State governments have also updated or revised their earlier State lockdown orders, largely to align them with the MHA guidelines. Some states have expanded the list of industries exempted from the lockdown. For example, facility management services that provide '*essential services*', FinTech services, veterinary hospitals, etc. are allowed to operate in Maharashtra till 14 April 2020. West Bengal has specifically exempted 'staff engaged in the maintenance of critical infrastructure such as servers.'

Can we require limited employees who are critical for business continuity to come to office?

Manufacturing units can operate as long as they are involved in the manufacture of essential commodities, or if operations require continuous service (subject to State government approval). Thus, for these purposes, critical employees could be asked to work at the unit.

For IT and ITES establishments - the exception under the MHA guidelines is rather vaguely worded, and it could be said that the guidelines allow IT and ITES establishments to remain open for essential services, i.e., for essential/critical services within their organizations (although they should implement WFH to the extent possible).

However, before the MHA guidelines were issued, some States had ordered a complete shutdown barring a few listed '*essential service providers*'. In these State-specific orders, IT and ITES establishments were permitted to operate to the extent they provided services to the listed '*essential service providers*.'

Several states like Karnataka, Telangana, Haryana, etc. have historically already declared the entire IT/ITES industry (or data centres) as an '*essential service*' under the Essential Services Maintenance Act, 1968 through their State IT policies. To that extent, there has certainly been a narrowing down of the scope of exemptions to the IT industry via the MHA guidelines. Even an office memorandum issued by the Ministry of Electronics and Information Technology on 24 March 2020, tends to only make note of limited services provided by IT companies as essential services, such as Government Services (tax administration, e-governance, passport services), healthcare and insurance-related processing, support to public utilities (like gas, electricity, mobile, broadband), maintenance and support of communication infrastructure, transport-related logistics support, support to banking and payment services, etc. Therefore, the approach of the MHA guidelines and even the general on-ground approach of local administration appears to be that only IT/ITES companies that are catering to other essential service providers (like banking, healthcare, telecom, etc.) are being permitted to operate in limited capacities. However, there is certainly an element of

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discretion and we are seeing variations in the approach based on location. In few locations, police also appear amenable to allowing a few employees of IT/ITES establishments to operate for carrying out critical/essential work for or within their companies, such as maintenance of servers, transporting IT equipment, etc.

It must be noted that various State governments have launched online/offline approval mechanisms to seek an exemption to operate, from the district collectors, as well as movement passes (or curfew passes/COVID-19 passes) for employees from the local police. Therefore, where operations are critical or essential, organizations are advised to seek specific clearance from local administration to operate their offices and allow employees to travel in limited capacities.

Our revenue generation has taken a huge hit. Can we place our employees on unpaid leave during (and even after) the lockdown?

Indian employment law does not recognize the concept of 'furloughing' (i.e., asking employees to go on mandatory unpaid leave). The general employment-law principle is that employees should be paid if they are ready and willing to work, whether or not an employer can provide work.

Several companies were considering placing employees on unpaid leaves or making pay-cuts during the lockdown. By virtue of an MHA order (dated 29 March 2020) all employers of commercial establishments, factories, shops, etc. are required to pay salary to the workers on the due date, without making any deductions, for the period that the establishments are closed during the lockdown. The State governments have been directed to issue necessary orders to the police and district magistrates to enforce this MHA order. Given this, there would be an obligation to pay to all employees, even unproductive permanent employees (i.e. who can't work remotely) for the period that their work is temporarily suspended on account of the government-mandated lockdown. Without any financial incentives from the government, these orders are likely to cause significant financial distress to organizations during the lockdown period, especially those whose employees cannot be fully productive while working from home.

In fact, few State-specific lockdown orders (such as Delhi, Telangana and Uttar Pradesh) already had such provisions, where employers of private and public establishments have been directed to (a) consider employees to be on 'paid leave' or 'on duty'; and/or (b) pay full salary to the employees (including contractual and outsourced employees) during the State-specific lockdown period.

As the MHA order and State-specific directions have been issued under particular statutes (i.e. Epidemic Diseases Act, 1897 and Disaster Management Act, 2005), violating the same would have penal sanctions.

Further, many other State labour commissioners have issued advisories requesting employers not to terminate permanent or contract staff or reduce wages during the lockdown period. While these may not be binding, given that the MHA's order refers to all employers and will result in further State specific strictures on these lines, attempts to furlough or lay-off employees during the lockdown is likely to create a larger risk of disputes, and expose employers to administrative scrutiny or penal sanctions.

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Since we cannot mandate unpaid leave, can we at least look at trimming the workforce, or pay reduced salaries? How about asking them to go on leave using existing paid leave balances? If not, what avenues do we have to reduce our employee costs?

On account of the MHA order, State-specific lockdown orders and the various labour department advisories referred to earlier, trimming headcounts or pay reductions during the lockdown period would be fraught with the risk of disputes, scrutiny and penal sanctions.

If terminations are made, those would need to comply with the statutory norms, including but not limited to compliance with the rules on last-in-first-out, and government notification or prior permission (depending on the size and nature of the industry). Directing employees to utilize existing leave balances would be adverse changes to their terms of employment and may not be possible to roll out without their voluntary consent. The unilateral imposition of such measures for workman category employees would require compliance with the 21 days or 42 days advance notice requirements (based on location), and therefore run the risk of being stayed by courts beforehand.

In terms of the other cost-trimming options, companies could look at reducing the quantum of discretionary and non-contractual benefits given to employees. Also, for companies that have a practice of making uncapped provident fund (PF) contributions (i.e. if they do not cap employer-contributions at 12% of INR 15,000), another option could be making capped contributions going forward. That said, if the amount of PF contributions has been contractually agreed to, employee consent would be required for reducing the quantum of contributions. Even if this is not set out in the contract, obligations on issuing prior notice (of 21 days or 42 days, based on location) would be triggered.

Can we rescind offers of employment for individuals who are yet to join or delay their joining date?

Subject to terms of any executed offer letter and/or employment contract, organizations could potentially defer out joining dates due to genuine limitations associated with onboarding new staff and/or limitations associated with letting them work remotely based on the nature of their job. It would be advisable to mutually agree to a revised date in such situations. Subject again to the terms of any executed paperwork, rescinding accepted offer letters entirely may expose organizations to a risk of claims for breach of contract. It would be advisable to take a cautious approach in these circumstances.

What incentives has the government offered for employees, and for employers to retain employees during the business downturn?

So far, the government has announced limited incentives only, which largely benefit workers in the unorganized sector or small establishments in the organized sector. A second incentive package is in the works and is expected to be announced shortly. Some highlights of the first package are as follows:

- Government to contribute employer and employee PF (24%) for the next 3 months in establishments with up to 100 employees, of which 90% earn below INR 15,000 per month;
- Employees have been given the right to take a non-refundable advance from their PF accounts, up to 75% of their PF balance or the sum of their basic wages and dearness allowance for the last 3 months, whichever is less;

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- PM Garib Kalyan Ann Yojana extends food relief to the nation's poorest.

Further, under the MHA order (dated 29 March 2020) landlords are prohibited from demanding rent for 1 month from workers (migrant workers or *otherwise*) living in rented properties.

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